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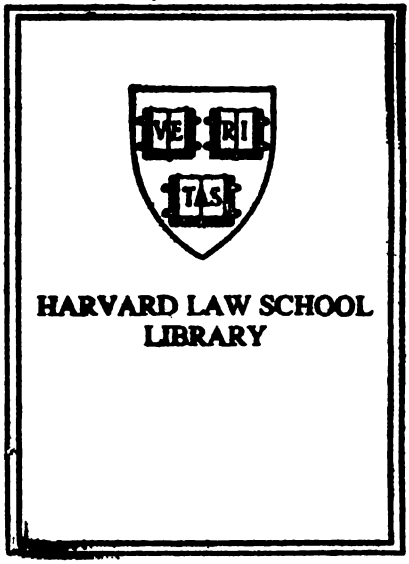

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MINNESOTA REPORTS

VOL. 119

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF MINNESOTA

JULY 19—DECEMBER 6, 1912

HENRY BURLEIGH WENZELL
REPORTER

O

LAWYERS' CO-OPERATIVE PUBLISHING CO.
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SECRETARY OF THE STATE OF MINNESOTA, IN TRUST FOR THE BENEFIT OF THE PEOPLE OF SAID STATE

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OF

THE SUPREME COURT

OF MINNESOTA

DURING THE TIME OF THESE REPORTS

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Hon. GEORGE L. BUNN
Hon. PHILIP E. BROWN
Hon. ANDREW HOLT

IRVING A. CASWELL, Esq., Clerk

ATTORNEY GENERAL

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NOTE

By R. L. 1905, § 85, the reporter is required to report all cases decided by the court.

Pursuant to R. L. 1905, § 74, the headnote in each case is prepared by the judge writing the opinion, except where otherwise noted.

With a few exceptions the cases are reported in the order of their decision. The date of the decision follows the title of each case. The numbers given below the date indicate the number of the case in the files of the clerk of court and the number of the case in the general term calendar, the calendar numbers being enclosed in ( ). The cases in this volume preceding the case on page 152 and the cases on pages 529 and 531 are from the April, 1912, term calendar; the cases on pages 162 to 529, and on pages 532 to 548, both inclusive, are from the October, 1912, term calendar.

As required by R. L. 1905, § 85, when any Minnesota case has been printed in the periodical known as "The Northwestern Reporter," and is cited in any opinion in this volume, a reference to the book and page of that periodical where such case appears has been inserted in such opinion. A similar citation for each opinion in this volume has been given in a footnote.

In citations from the first twenty volumes of the Minnesota Reports the page of the original edition is given, preceded by the corresponding page of the edition by Chief Justice Gilfillan.

The footnotes in the present volume which are preceded by the word "[Note]" are inserted by the publisher pursuant to the terms of paragraph 4 of its contract dated May 8, 1909, with the Secretary of State.

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PROCEEDINGS

IN MEMORY OF

ASSOCIATE JUSTICE COLLINS AND HONORABLE WILLIAM LOCHREN

LOREN WARREN COLLINS

August 7, 1838—September 27, 1912

On the afternoon of October 22, 1912, in the court room at the State Capitol, HON. ELL TORRANCE addressed the Supreme Court, then in session and said:

May it please the Court:

On behalf of the Minnesota Bar Association and upon motion of the Attorney General, the committee appointed by this Court to prepare and present to the Court a memorial of the life and public service of the Honorable Loren W. Collins, late Associate Justice of this Court, who departed this life September 27, 1912, in the discharge of its duty, has prepared a memorial which will now be read by Mr. Farnham, secretary of our committee.

The CHIEF JUSTICE then said: Mr. Farnham.

CHARLES W. FARNHAM, Esq., then read the following:

MEMORIAL

The Honorable Loren Warren Collins, once Associate Justice of this Court, died at Minneapolis on the twenty-seventh day of September last.

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He was born at Lowell, Massachusetts, August 7, 1838, of old New England stock. His ancestors served in the French and Indian War of 1760, King William's War, the defense of Fort Edward and of Black Point. They also held many positions of trust and responsibility in civil life, one of whom was the last Colonial Governor of New Hampshire.

At the age of sixteen Judge Collins came to the then territory of Minnesota with his father, who located on some unsurveyed land at Eden Prairie, Hennepin county. His education up to that time had been meager, being such as was afforded by the public schools of Chicopee and Palmer, manufacturing towns in Massachusetts, where his father, a mill operator, resided.

In the fall of 1858 he taught a four-months term of school near Cannon Falls, for which he received a school district order for $60; and in 1859, with this as his sole asset, he commenced the study of the law at Hastings with the firm of Smith, Smith & Crosby. In January, 1862, the firm dissolved and he remained with Judge Crosby until August following, when he entered the army and was at once promoted to Second Lieutenant of Company F, Seventh Minnesota Volunteer Infantry. While reading law he had some experience in trying cases before justices of the peace, but that was all. His army service was a meritorious one. For eighteen months he defended his adopted state against the depredations of the Indians, the ancient foes of his ancestors. He participated in the Sibley campaign, which terminated in the Battle of Wood Lake, in which the Indians were routed and five hundred white women and children released from captivity.

In the winter of 1864 his regiment was ordered south, and until the close of the war he was actively engaged in operations against the Confederate forces. He participated in the decisive battle of Nashville and was breveted Captain for gallant and meritorious services. Was honorably discharged from the service August 16, 1865, and spent the following six months in Alabama, as a treasury agent.

In May, 1866, he commenced the practice of the law at St. Cloud, and continued such practice until April, 1883, when he was appointed to succeed Judge McKelvey of the District Court. During this period of seventeen years he acquired distinction as a lawyer and man of affairs. For four years he was associated with Colonel Charles D. Kerr, in the practice of the law, and for a somewhat shorter period with Theodore Bruener, Esq. In 1876, 1877, 1878 and 1880 he was Mayor of the city of St. Cloud, and for eight years was County At-

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torney of Stearns county. From 1881 to 1883 he was a member of the State legislature.

November 16, 1887, while serving as Judge of the Seventh Judicial District, he was appointed an Associate Justice of this court, to fill the vacancy caused by the death of Justice Berry. The following year he was elected to succeed himself, and again in 1894 and again in 1900. April 1, 1904, he resigned to become a candidate for Governor of the state. In his unmerited defeat, the state of Minnesota sustained a loss from which she has not yet recovered.

At the age of sixty-six he resumed the practice of the law in Minneapolis and met with a success quite unusual for one so advanced in years and who had been out of active practice for so long a period of time. At the time of his death he was a member of the firm of Collins & Eaton.

While he was a member of this court he wrote over fifteen hundred opinions. They are models in style and composition, and no one, in reading them, would question his scholarly attainments or surmise that his early education had been fragmentary. He had the manners of a scholar, and in his conversation and writings disclosed a self-culture that was the full equivalent of a liberal education.

He was a man of sterling integrity, of great moral courage and unblemished honor. He had a profound sense of duty, which with his natural vigor of mind enabled him to accomplish much. The history of Minnesota from territorial days down to the present time cannot be properly written without a recital of the civil, military, and judicial service of Judge Collins. He was a man of strong personality, uniformly courteous and agreeable, and commanded the respect, confidence, esteem and friendship of all who knew him. Of him it can be truly said that he combined in rare degree the virtues, qualities and excellences of jurist, statesman, soldier and citizen.

ELL TORRANCE,
KNUTE NELSON,
THEO. BRUENER,
J. N. SEARLES,
LYNDON A. SMITH,
CHARLES W. FARNHAM,
M. B. WEBBER,
WALLACE B. DOUGLAS,
C. L. LEWIS,
Committee.

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HON. ELL TORRANCE then addressed the court and said:

May it please the Court:

The records of this court contain many cherished memorials, and today another is added to the lengthening roll of honor. These memorials are the incense that envelop the shrine of justice. They are tributes which the living pay to those

"Whose actions, like the just,
"Smell sweet and blossom in the dust,"

and their chief value consists in the inspiration to better things which follows the contemplation of the lives and services of those distinguished for excellence of character, efficiency of service and nobility of soul.

Minnesota, since her birth, has been fortunate in the character of her judges, and especially so as to those who have constituted the court of final resort. In the history of American jurisprudence the opinions of this court will, I am sure, share an immortality no less illuminating and instructive than that of the courts of other commonwealths, and the moral qualities and high ideals of her judges will lend strength and beauty to the written page.

Invaluable as the work of this court has been in interpreting and applying right rules of conduct to human affairs, and in safeguarding life, liberty and the pursuit of happiness, I firmly believe that the character of the eminent men, who from time to time have composed the Court, has exerted upon society a beneficial influence as helpful and enduring as the product of its official labors.

A just, wise and fearless administration of the law is possible only when those who administer the law are men of wisdom, courage and uprightness, and to the memory of one whose life and public services measured up to the highest standard that can be applied to conduct and duty, we today out of grateful hearts pay a sincere and affectionate tribute.

For more than half a century Judge Collins stamped his person-

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ality upon the affairs of this great state, and it is a pleasure and a privilege on this occasion to speak his just praise.

He was a learned, clear-headed, right-minded, honorable and just judge. He met all the requirements of his great office. His services as a member of this Court were contemporary with those of some of the greatest jurists of the state. For years he was a co-laborer with Chief Justice Gilfillan and Justices Mitchell, Dickinson and Vanderburg. He had great capacity for work and was a man of extraordinary industry. Patient, tireless, painstaking, he could not rest content with a single duty unperformed. He had an attentive mind and a retentive memory. He grasped with readiness the facts in a case, even to the minutest detail, and with ease arranged them in orderly sequence so that, with the law clearly in mind, he could speedily reach a right conclusion.

But I will not longer dwell upon his services as a member of this court. They are monumental and constitute a part of the permanent wealth of the state, and among the illustrious names that have adorned the bench and bar of Minnesota, none will shine with a clearer or steadier radiance than that of Judge Collins.

For a few moments I now ask the indulgence of the court while I speak of him as a man, for he was more than a great administrator of the law. He was a lovable man, a good citizen, a true patriot, a devoted husband, an affectionate father and a sincere friend. He was a many-sided man, but at all times and everywhere he was sincere, steadfast and dependable. He was a courteous, well-bred gentleman, and although at ease in the abodes of the rich, he was not a stranger in the homes of the poor. He was a popular man in the best sense of the term. His friends were legion. I have often walked with him on the crowded streets of my home city, feeling that I was almost among strangers, while Judge Collins would again and again be greeted in the most cordial manner by those who knew him. I have traveled with him on long journeys, rarely seeing anyone that I knew, while he would meet and greet friends at every turn.

He had a sane and wholesome mind, always hopeful, optimistic,

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and of two evils he rejected both. He believed in his fellow men and his fellow men believed in him. He looked upon the bright side of life and the windows of his soul opened toward the south and to the sunshine. He did not, as many do, regard the age in which he lived as a sordid one. While recognizing the evils in society and the importance of their correction, he believed that the world was growing better every day and that belief helped to make the world better.

His attachments were strong and applied to places as well as to persons. While his duties made it necessary for him to be absent from St. Cloud much of the time, and finally to change his residence to another city, his real home remained at St. Cloud until the day of his death. For it was there that he had achieved his early successes in life. It was there that his children were born and where the hearth burned brightly with a sanctifying warmth. It was there that the wife of his affection and his dearly beloved daughter fell asleep and at whose graves sorrow carved deep lines of grace and beauty upon his soul. It was there that many of his compatriots of the Great War resided, and strong as were the inducements for him to transfer his membership in the Grand Army of the Republic to another Post, he would not desert his old comrades in their declining years, and one of the most touching and pathetic incidents connected with his funeral was the tender tribute paid by the venerable survivors of his Post as they gathered about his casket and covered it with flag and flowers.

True friendship is the staff and comfort of our earthly pilgrimage and the severing of the silver cord that binds friend to friend gives lasting pain. Nevertheless, there is more of joy than of sorrow on occasions like this. When the summer is ended, the bountiful harvest is gathered with gratitude and song into the barns and the ripe fruit is plucked with gladness from the overladen branches. If it were not so, then would the remembrance of the blossoming trees and the waving fields of grain bring pain rather than pleasure, for without fruitage all ends in disappointment and sorrow. But the contemplation of the useful life of our friend brings to our hearts comfort and satisfaction, and we are thankful that he rests from his labors and is at peace in the abodes of the blest.

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HON. WALLACE B. DOUGLAS then addressed the Court and said:

May it please the Court:

While shocked at the sudden going from our midst of Justice Collins, it still affords me pleasure to bear testimony to the fact that my thought harmonizes with the expression of his most intimate friend, Judge Torrance, who has spoken here today. It was my very great good fortune to know Judge Collins intimately while judge of our District Court in the old Seventh Judicial District, and I recall the first impression gained after his appointment, namely, that he was always alert and quick to decide, and as our acquaintance deepened, I was impressed by his sound judgment and the hearty good fellowship in his make-up which was always dominant. We learned later that he was an accurate lawyer, and he gained in full measure the regard and confidence of the bar upon his circuit. It was my good fortune to be associated with him still later in many ways during the longest period of his usefulness, while he was Associate Justice of this court, and it occurs to me at this moment that naught has been said by his most intimate friend, except that which we can all testify to with reference to his many-sidedness, his judicial ability and to his accuracy as a lawyer, and it affords me very great pleasure to say that, during the many years of our acquaintance and friendship, I always found him to be a man of the highest integrity, great courage and one of the most useful officers who ever served in this state.

HON. MARSHALL B. WEBBER then addressed the Court and said:

It had not been my expectation to say anything, personally, in memory of Justice Collins, except what is uttered in the memorial, and I do so only through insistence on the part of members of the committee. I am very glad to bear testimony to the many lovable characteristics of Justice Collins.

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These occasions always appeal to me as somewhat hollow. What we say in commemoration of those that have gone on cannot be heard by them, and the thought often comes to me of the expression of another that "A single rose to the living is more than sumptuous wreaths to the dead." Of course, all the virtue there is in these memorial exercises is in commemoration of those characteristics of the dead which are worthy of exemplification on the part of the living.

I remember Justice Collins as a very lovable and approachable man, a man, who, upon all occasions, whether upon the bench in his official capacity, or upon the street, or in any social gathering, was always a lovable acquaintance and valued friend.

I have thought, at times, that there was seemingly an impenetrable wall between the bench and the bar, but with Justice Collins I believe no lawyer ever felt that he was not at any time welcome, or that he could not approach him as an acquaintance on terms of intimacy, and with that intimacy between the bench and bar, judge and lawyer both become stronger and better.

I cheerfully bear my testimony to the lovable characteristics of this dead Justice. I shall ever revere the memory of Justice Collins.

CHARLES W. FARNHAM, Esq., then addressed the Court and said:

From Mr. Bruener, of St. Cloud, a member of our committee, comes this communication:

Owing to my inability, on account of illness, to be present at the memorial exercises in honor of the late Justice, Loren W. Collins, I have requested the secretary of your committee to present this my tribute of respect, of love and admiration for the life and character of the deceased jurist.

I regard it as a great privilege and my utmost good fortune to have made the acquaintance of that good and noble man, Judge Collins, soon after my arrival in the North Star state in 1879, and to have become associated with him in the practice of law in the summer of that year, in the city of St. Cloud. Having at that time just graduated from the University of Michigan, with but a meagre

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working knowledge of the law, Captain Collins, as he was then addressed by everybody, was ever ready and willing to be interrupted in his work to answer questions and to extend a helping and sympathetic hand. He was indeed a father to me in these early days of my career. But not to me alone did his kindly and sympathetic soul go forth, but to everyone needing assistance. No young man ever applied to Captian Collins for assistance, advice, or comfort, in vain.

Courteous and cheerful at all times, casting sunshine wherever he went, Judge Collins was loved and admired by everybody. The fact that he was elected County Attorney for three consecutive terms, and once for the legislature, in a county where the great majority of the voters affiliated with a different political party than his, is evidence of the great esteem in which he was held by the people.

It was, therefore, not surprising that with his untiring energy, a well educated mind and his admirable traits of character, he rose rapidly in his profession, was chosen District Judge of the Seventh Judicial District, and while still a young man, was elevated to the high and responsible position of Associate Justice of the Supreme Court, which he filled so excellently for so many years.

In his death the state has lost one of its best, most beloved, and most distinguished citizens. Long will his memory live in the hearts and minds of all who knew him, and long will his services to his country be gratefully remembered by those who justly appreciate them.

HON. J. N. SEARLES then addressed the Court and said:

My first recollection of the late Judge Collins dates back to the time he became a citizen of Hastings, in this state, in the year 1858, I think. I remember his being in the law office of the late Judge Seagrave Smith and his partners for the purpose of qualifying himself for the legal profession. Under the tuition of Judge Smith he had the leadership of one of the many solid legal intellects who have graced the bench of this state, one who had graduated from a Connecticut law office at a time when lawyers were confined in their

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studies chiefly to the leading text books. Then it was difficult to find, what we now speak of as a "case lawyer." In those days we took delight in consulting the text books for the principles of law. It was chiefly a day of Kent, Greenleaf and leading works on Equity and the other main branches of the law that constituted the lawyer's library. It has been a matter of common knowledge that lawyers of that age were among the most successful members of the bench and bar in this country. Judge Collins had that very desirable training.

When the war broke out circumstances led him in one direction and me in the other. My next acquaintance with him was of a casual character, when I found him practicing law at St. Cloud. Afterwards I had the pleasure of meeting him in the legislature in the session of 1881, where he took a leading and active part in the House as one of its members. I remember the activity and zeal that was displayed by him in the adjustment of the old Minnesota Railroad bonds. They had been a subject of constant discussion ever since the organization of the state. With the aid of this Court that controversy was adjusted. He was largely instrumental in bringing about that result.

Judge Collins' intellect as a lawyer was exceedingly alert. He had the faculty of taking the proper focus of legal propositions. He could hold off a state of facts at the right distance and get a correct photographic outline of its legal qualities. He was always ready to justify his opinion by reference to the fundamental principles that he had absorbed from his early reading, and he possessed, in addition to that, the quality of a good mixer among men. He had, far beyond most of us, the quality of extending his acquaintance with men with whom he associated. He was thereby less subject to the criticism that has been made of the legal profession, especially in these later years, that they are so conservative that they do not keep abreast of the movement of the masses of people; that their studies lead them to look backward instead of forward; that they are looking for precedent on which to base their action and, consequently, their eyes are turned rather to what has been than to what is or should be. Judge Collins was comparatively free from such criticism, largely owing to his extended acquaintance with all classes of men. The seventeen

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years that he served on this bench, as one of the members of this Court, were seventeen of the most eventful years of the legal life of this state, and during the entire period he acquitted himself with honor and credit, not only to himself, but to the people who placed him there. The fifty or more volumes of this Court that contain the results of his labors on this bench are, and ever will remain, a memorial to the industry, integrity and courage of Judge Collins. And those are the fundamental elements of good citizenship.

HON. ELL TORRANCE then said:

May it please the Court:

I believe that all the members of the committee present have now addressed the Court. At the time of Judge Collins' death he was associated in the practice of law with Mr. Eaton. Mr. Eaton is here and I am sure we shall be glad to hear from him.

The CHIEF JUSTICE then said:

The Court will be glad to hear from Mr. Eaton.

LEW K. EATON, Esq., then addressed the Court and said:

In all that has been said I concur, and deeply cherish this opportunity of saying something of the affection and admiration that I bore for Judge Collins, and of the reverence I bear for his memory.

I believe that it is perhaps more difficult for me to express my regard for him than for any person present, outside of his immediate family. My association with him was wholly confined to the later years of his life, and I can only speak of his more active period from the records of this court, where for all time is preserved the remarkable clarity of his mind. I do not believe that in the records of any court are found the principles of justice, however profound, laid down more directly, more clearly or more purely, than in the opinions written by Judge Collins.

My knowledge of his character, mind and disposition comes from

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intimate, personal and daily contact as a business associate. It is difficult to say which of his many admirable qualities seemed to predominate, but during our association what seemed to me more remarkable than anything else, in these late days of new theories and ultra-modern economics, was his admirable sanity.

Though past threescore and ten, his mind was that of ripened manhood. Whatever public question was being discussed, in a few sentences he would go to the root of the subject, discard its non-essentials, and give his opinion clearly and concisely, and one might always be sure that that opinion was the reasonable and sane opinion. He could not abide the sycophant, the demagogue, nor any of those "miserable aims that end in self." He stood for humanity. He had many charities and gave freely in a material way, and what was vastly more important, he gave his sound healthy-minded advice.

Wherever he was known he was respected and admired, and I believe that admiration was caused by his rugged honesty, which stood four square to all the world.

His love for his comrades in arms and his enthusiasm for their well-being showed itself by some act each day. He gave unstintedly to these objects, both of his purse and of his life. No journey was too long, no work too hard for him to undertake, if it concerned the Grand Army. Since January, 1911, his health had not been of the best, but in spite of the fact that he had full knowledge of his condition, he did not in any wise diminish this labor of love, nor did it in any wise diminish his interest in affairs, his nimble wit or kindly humor. He was always courteous, always kindly to every person, whatever be his or her circumstances.

I find it very difficult indeed to speak of our relationship. It taught me that he was an ideally devoted father and a firm friend. Our relations were more than those of professional associates, for with the same feeling with which I would have consulted my own father I repeatedly asked and took his counsel and advice in the every-day affairs of life, and that counsel and that advice were always good.

In him the state has lost one of her first citizens, the bench and bar have lost one who should be an example to all members, his

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sons have lost a devoted father, and I have lost my guide, counselor and friend.

It is therefore trebly difficult for me to express my affection and admiration. From his own lips, and from the records of this Court, from the history of this state and the testimony of those who knew him well, I have learned of his life; from daily association I learned to know his mind and character; from all of this, it seems to me that, when I say that Judge Collins was of the finest type of the American and the lawyer, the jurist and the citizen, one who was a true friend, whose memory I shall ever revere, I have only spoken the truth.

CHIEF JUSTICE START then responded for the Court and said:

Gentlemen of the Bar:

It is difficult for me to speak of Judge Collins without seeming exaggeration, for he was one of my most intimate and cherished friends. I knew him personally for some thirty years; but it was not until 1895, when I became a member of this Court, that I came to know him intimately and to appreciate his great ability and sterling character. We were associated in the work of this court for more than nine years, and our official relations resulted in a close and devoted friendship which grew stronger as the years advanced.

His was a lovable and interesting personality, and he made friends readily and retained them by his worth and cheerful readiness to help them. He was a devoted father, and his care for his motherless boys was touching. He was to them a loving father, mother, comrade and friend; their inspiration and example. His mental grasp was clear and incisive; his impulses honorable; and his manner simple and unaffected. He was a man of manly common sense, of unquestioned integrity, and of great intellectual force.

He was, as was his nature, always courteous to his associates on the bench, and deferential to their views. He was, however, a man

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of independent judgment, reaching his conclusions with care, to which he adhered unless, upon a full discussion in the consultation room, he became satisfied that they were not legally right and just.

He was a keen and accurate observer of men and things which, with his knowledge of the history and traditions of the state, its public men, laws, and institutions, together with his great ability, industry and legal learning, made him a practical, able and just judge. The state in his death has lost one of its best and most eminent citizens, whose life was clear and clean, and full of useful work and unobtrusive kindness.

The Court receives with grateful appreciation your memorial, which is a just and merited tribute to a loyal friend, a public-spirited citizen, a brave soldier, an able and just judge, and a man of unblemished honor.

As a tribute to his memory, the Court directs that your memorial and addresses be entered in the records of the Court for the day.

WILLIAM LOCHREN

April 3, 1832—January 27, 1912

CHARLES W. FARNHAM, Esq., then addressed the Court and said:

The Committee of the State Bar Association presented to the Federal Court a memorial to Judge Lochren. It has seemed well to present that memorial to this Court, owing to Judge Lochren's connection with the administration of law here. The committee did not follow the precedent which has been established in the matter of the length of the memorials as we present them to this Court. I therefore fear I shall do violence to the memorial for the sake of brevity.

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MEMORIAL

William Lochren was born in County Tyrone, Ireland, on the third day of April, 1832. His father, Michael Lochren, died when William was little more than one year old, and his mother, Elizabeth, with her fatherless boy and other kinsmen, crossed the Atlantic while the lad was not yet two years old to find a home on a farm in Franklin county, Vermont. During his childhood, the steep hillsides and rocky fields of a Vermont farmstead furnished young Lochren with ample labor in summer, while during the winter months a New England schoolmaster, in a meagrely furnished district schoolhouse, taught him the rudiments of learning. He devoted as much of his time as possible to study, and from the earliest period he had a strong ambition to acquire knowledge. At the age of eighteen, he went to Auburn, Massachusetts, where manual labor alternating with assiduous study occupied the next four years, during which time he was able to obtain a fair academic education. In 1854 he returned to Franklin county, Vermont, and commenced the study of law. He continued his legal studies for two years and in 1856 was admitted to the bar.

Soon afterwards he moved to St. Anthony, Minnesota, where he entered upon his chosen life work and where for more than half a century he continued to make his home. He continued in practice, either in partnership with others or alone, until April 29, 1861, when he enlisted in Company E of the First Minnesota Volunteers.
* * *

In 1868, he was elected State Senator from a strong Republican district and served two years. In the following spring he formed a partnership with W. W. McNair, and in 1871 J. B. Gilfillan became a member of the firm of Lochren, McNair & Gilfillan, a firm distinguished in the legal annals of the Northwest. In 1877 and 1878, he was elected city attorney of Minneapolis. * * * And on November 19, 1881, he was appointed a district judge of the Fourth judicial district by Governor John S. Pillsbury, of opposite political affiliations. At the election in November, 1882, he was elected for a term of six years, and in 1888 was elected for a second term, his nomination at each election having been made by both the Republican and Democratic parties. Near the close of his second term as district judge, President Cleveland appointed him Commissioner of Pensions, which position he held for over three years, and on May 26, 1896, he was appointed by President Cleveland Judge of the United States District Court to succeed Judge Nelson, who

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retired at that time. In this office he served until March 31, 1908, when he resigned, was placed on the retired list and retired from active work. He died January 27, 1912.

He was married in 1871 to Mrs. Martha Demmon, who died in 1879, and in April, 1882, he married Mary E. Abbott, who with one son, William Abbott Lochren, born February 26, 1884, survives him.

During his active practice he was engaged on one side or the other of all of the important litigation of the Northwest, and to review his record as an active practitioner would in substance amount to a legal history of the Northwest. The affairs entrusted to him were always of the weightiest, and his name was a source of strength to his clients and an ornament to his profession to the last. He possessed a rare combination of ability to quickly perceive principles of law and discern precedents, with a power to make effective application of them to the case in hand, as well as a natural and legal judgment, so sound and clear as to be an exceptionally safe guide in itself.

The newspapers of the early days of Minnesota will give some conception of the high value placed even then by the citizens on his services, and of his high standing and integrity both as a citizen, a lawyer and a legislator; and history further shows that his sympathies and interests lay in many directions. He was actively identified with Holy Trinity Episcopal Church, serving for many years as a warden. He was also active in Masonic affairs until the time he became a judge. * * * One of the business lines that received his attention was banking, and he served for a long time as one of the directors of the First National Bank of Minneapolis. He was also at one time president of the Board of Trustees of the Minneapolis Academy, a body embracing many leading citizens. * * *

Of his army record, the fact that he was a member of the famous "First Minnesota" and shared in all the battles of that regiment leaves nothing to be said. He served on battle fields whose names have become classics in American history, and participated with that regiment in making the historic charge at the battle of Gettysburg. He was a member of George N. Morgan Post, G. A. R., and of the Military Order of the Loyal Legion of the United States, Minnesota Commandery, of which he served one year as Commander in 1890. He also served one term as Judge Advocate General of the Grand Army of the Republic. In 1889, under an act of the legislature, he was appointed one of a commission to prepare a history of Minnesota in the Civil and Indian Wars. * * * He was also appointed in 1891, chairman of the Commission to select a monument in commemoration of the valor of the First Minnesota on the field of Gettysburg, at the dedication of which, in 1897, he delivered one of the addresses. * * *

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Upon the bench were fully developed and displayed his peculiar fitness for and wonderful adaptation to judicial duties. His patience was proverbial, his self-control masterful, his courtesy uniform, his manner kindly and his attitude wholly impersonal. Clearness of perception, generosity of labor in research, accuracy in detail and statement, strength in diction, intuitive sense of justice, and a comprehensive and thorough knowledge of jurisprudence were the qualities of Judge Lochren, predominating in a high degree. Nothing ever tried his equanimity or disturbed that serene composure that was natural to the man, becoming to the judge and most gratefully appreciated by those who were called to present their contentions in his court. No lawyer ever left his presence without the pleasant impression that he had had, to the fullest extent, his day in court, and if mistakes were made by counsel, the generous and sympathetic disposition of Judge Lochren seemed to overlook them, and the youngest members of the bar came to regard him with paternal respect. His consideration of every case was careful and thorough, but his decision once made was inflexible. No judge in Minnesota was ever more highly esteemed and loved by the bench and bar than William Lochren. His nomination as a Federal judge was sent to the Senate by President Cleveland on Saturday afternoon, and on Monday morning, without a reference to the judiciary committee, was confirmed by the Senate. On the Federal bench he was indefatigable, and performed the duties of that office without assistance nearly up to the time of his retirement, when Judge Morris was appointed an additional judge for the District of Minnesota. He was in demand as a substitute on the bench of the United States Circuit Court of Appeals (for the Eighth Circuit) and to assist other district judges in various states of the Eighth Circuit. Not only did he serve for many years at all of the terms of the Federal courts in Minnesota, but he acted seven full terms on the Circuit Court of Appeals. * * *

His personal characteristics have been briefly referred to in speaking of his work on the bench. He was kindly and courteous, and a loyal friend. He sought and retained the friendship of all around him. With but slight opportunities for an early and thorough education, he improved every later opportunity. He was a constant student and ever a lover of books. Gifted with a remarkably retentive memory, a clear and analytical mind, and unusual habits of thoroughness, he acquired a vast knowledge of the law, history, and literature and a great store of general information, and these were always at his command, both in his judicial work and as a genial and entertaining companion.

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At the memorial services held in the United States Circuit Court on December 6, 1903, for Judge Nelson, his predecessor, Judge Lochren, in making a response to the memorial presented by the members of the bar, said of Judge Nelson, these words, which fittingly apply to him:

"The records of these courts disclose the character and extent of that work, and bear witness to the learning, ability, integrity and industry with which that work was performed. These records contain his decisions, which his successors will consult for their guidance; fortunate to have such helps in their efforts to emulate his usefulness. His amiable personal and social characteristics, which attached to him all who came within the range of his acquaintance, have been referred to by many of you who knew him intimately. He also possessed that quiet, natural dignity, with nothing of coldness in it, which compelled decorum in his presence."

"I will conclude by quoting words which he himself spoke of another on a like occasion and which as aptly apply to himself: 'No judge ever was influenced by purer motives or surrounded by a higher moral atmosphere.' * * * He was learned in the law, which he administered wisely, and thus won confidence and esteem."

JAMES D. SHEARER,
Chairman.
J. L. WASHBURN,
EDWARD LEES,
PIERCE BUTLER,
LORIN CRAY,
Committee.

The CHIEF JUSTICE:

The Court has heard the eloquent and merited tribute to Judge Lochren and directs that it be entered in the records of the Court for the day as a tribute to his memory. And for our tribute to Judge Collins and Judge Lochren the Court now adjourns.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA.

RICHARD HAYES, Jr. and Another v. SUSAN HAYES.[1]

July 19, 1912.

Nos. 17,536—(137).

Finding of evidentiary facts.

Action to recover possession of land. The complaint alleged title and right of possession in the plaintiffs, and the answer alleged title and possession in defendant. The findings of fact were that plaintiffs were the owners in fee of the land and entitled to the immediate possession thereof, which was wrongfully withheld from them by the defendant. *Held:*

1. That trial courts are required to find only the ultimate issuable facts, and are not bound to find mere evidentiary facts. It was not error to deny defendant's motion to amend the findings.

2. The findings of fact herein are sustained by the evidence.

Action in the district court for Dakota county to recover possession of certain land and $100 damages. The case was tried before Johnson, J., who made findings and conclusions of law as set forth in the

[1] Reported in 137 N. W. 162.

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opinion. From an order denying defendant's motion for additional findings and for a new trial, she appealed. Affirmed.

C. D. & R. D. O'Brien, for appellant.

Albert Schaller, for respondents.

START, C. J.

This action was brought in the district court of the county of Dakota to recover possession of land described in the complaint. The complaint alleged that the plaintiffs were the owners in fee of the land and entitled to the possession thereof, and that the defendant was in possession of the land and wrongfully withheld the same. The answer denied that the plaintiffs were the owners of the land or entitled to the possession thereof, admitted that the defendant was in possession, and alleged that she was the widow, and only heir of Mathew Hayes, deceased, who at the time of his death was lawfully seised of the land and had title thereto; that he for fifteen or more years next preceding his death was in the open and uninterrupted possession of the land and made valuable improvements thereon; and, further, that since his death the defendant has remained in possession thereof and has continued to improve the same. The answer demanded only that plaintiffs take nothing by their action and for costs. The reply admitted the death of Mathew Hayes and that the defendant was his widow and only heir.

The cause was tried by the court without a jury and findings of fact and conclusions of law were made to the effect following: The plaintiffs are the owners in fee and entitled to the immediate possession of the land described in the complaint. The defendant is in possession of the land and wrongfully withholds the same from the plaintiffs. As a conclusion of law the court found that the plaintiffs were entitled to the possession of the land, and ordered that judgment be entered accordingly. Thereupon the defendant made a motion for amended findings of fact as to the time and circumstances under which the defendant's husband took possession of the land, the length of time he and she occupied the land, whether their possession was exclusive or not, whether he made improvements on the land, or bought other lands adjoining, or insured the buildings on the land,

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or paid taxes, or claimed to be the owner of the land by gift from his father. The motion was denied. The defendant also made a motion for a new trial, and appealed from an order denying it.

The first contention of the defendant is that the court erred in denying her motion for amended findings of fact. An examination of the proposed amended findings shows that they related to evidentiary facts, or, in other words, the court was asked to find or state the evidence on the part of the defendant relevant to the issue as to the ownership and right to possession of the land. The facts required to be found by a trial court are the ultimate issuable facts, and it is not bound to find mere evidentiary facts. 3 Dunnell, Minn. Dig. § 9851. The ultimate issue in this case was whether the plaintiffs were the owners and entitled to the possession of the land, or was the defendant the owner thereof and entitled to its possession? If the plaintiffs were, then, necessarily, the defendant was not; therefore a finding of the ultimate fact that the plaintiffs were the owners in fee of the land and entitled to its possession was all that was necessary to support a judgment in their favor. The trial court did not err in denying the motion to amend the findings of fact, nor in refusing to amend its conclusions of law.

The other assignments of error meriting special consideration are to the effect that the court erred in finding that the plaintiffs, instead of the defendant, were owners of the land and entitled to its possession. The evidence shows that the record title in fee to the land was, on April 13, 1909, in Timothy Hayes, Sr., and that on that day he conveyed it to his grandchildren, the plaintiffs herein. It is claimed on behalf of the defendant that Timothy Hayes, Sr., some seventeen years before the death of his son, Mathew Hayes, made a parol gift of the land to him; that he accepted the gift and entered into possession of the land; that he continued in such possession until his death, holding and treating the land during all that time as his own; and, further, that the manner of such occupancy and use for seventeen years established a possession which passed the title to himself and heirs.

The evidence is quite clear that Mathew Hayes entered into possession of the land in 1892, and continued therein until his death in

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1909, and that during this time he received the income from the land, paid the taxes for a portion of the time, made permanent improvements thereon, and insured the buildings thereon in his own name. The evidence, however, is equally clear that such possession was not adverse, but permissive, and with the consent of his father, Timothy Hayes, Sr., the owner of the land. The evidence also tended to show that such possession was with the understanding that Mathew Hayes was to have what he could make on the land for a few years until he could get a start. The record discloses no evidence sufficient to require a finding of either an executed parol gift of the land to Mathew Hayes or title thereto by adverse possession. We must, therefore, hold that the findings of fact are sustained by the evidence, and that they sustain the conclusions of law.

Order affirmed.

DAVID O'BRIEN v. NORTHWESTERN CONSOLIDATED MILLING COMPANY.[1]

July 19, 1912.

Nos. 17,584—(194).

Pleading — complaint — submission to jury on certain theory.

Where the complaint in a personal injury action by a servant against his master alleged a failure on the part of the defendant to provide a safe instrumentality, namely, a ladder which was used in lieu of a stair, and that the plaintiff was injured by reason of its defective condition, but it was also alleged that the plaintiff was injured by reason of the defendant's failure to furnish him with a safe place in which to work, the only objection, if any, to which the pleading was open was that it suggested a case where the plaintiff might, perhaps, have been compelled to elect between two different theories of recovery; and, in the absence of any motion to compel the plaintiff to so elect, there was no reversible error in submitting the case to the

[1] Reported in 137 N. W. 399.

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jury, under the evidence, upon the theory of the defendant's duty to provide the plaintiff with a safe place in which to work.

Variance — curing defect.

The result, at most, was a mere variance, which, if it had been objected to, could have been cured by an amendment of the complaint on the trial, or even after judgment.

Duty of master to maintain safe stair for servant.

A ladder, installed by the defendant in lieu of a stair, *held* to be a stair in the contemplation of the law, with the same resultant duty on the part of the defendant to maintain and keep it safe for the use of its employees as though it had been a stair in fact.

Master's negligence question for jury.

The question as to whether the defendant was negligent in failing to furnish the plaintiff, its servant, with a safe place in which to work, the plaintiff having been injured by reason of a defective ladder used as a stair, *held* for the jury.

Question of contributory negligence.

The question as to whether the plaintiff was guilty of contributory negligence in failing to avail himself of readily accessible means of steadying himself while ascending the ladder, and in otherwise failing to make special effort to conserve his safety while making the ascent, *held* for the jury.

Questions for jury.

The questions as to whether the plaintiff's injury was caused by the defective condition of the ladder, and whether he assumed the risk, *held* for the jury.

Action in the district court for Hennepin county to recover $2,000 for personal injuries. The answer alleged that any injury was caused by the negligence of plaintiff and that the instrumentality causing the injury was simple, and any and all things connected therewith were open and obvious to plaintiff, and to any person of ordinary intelligence, and that he understood and assumed the risks. The reply denied these allegations. The case was tried before Hale, J., and a jury which returned a verdict in favor of plaintiff for $300. From the judgment entered pursuant to the findings, defendant appealed. Affirmed.

Brown & Guesmer, for appellant,

Larrabee & Davies, for respondent.

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PHILIP E. BROWN, J.

Action to recover for personal injuries alleged to have been caused by the defendant's negligence. Verdict for the plaintiff. The defendant appealed from a judgment entered after a denial of its motion for judgment notwithstanding a verdict or for a new trial.

The material facts touching the alleged negligence of the defendant, as shown by the record, are as follows:

The defendant had been operating the St. Anthony H flour mill in Minneapolis for more than thirty years. There were two adjoining rooms therein, the floors of which were not on a level; the floor of one being between four and one-half and five feet higher than that of the other. The upper of these rooms was called the "packing room," wherein the packing crew worked, and the lower room was called the loading or bran room, and was used by the loading crew. Both the loaders and the packers had frequent occasion, in the performance of their duties, to pass from one of these rooms to the other. There were two routes from the loading to the packing room by stairway, but both were devious. In the partition between the two rooms, however, an opening had been cut about the size of an ordinary door, the bottom of which was on a level with the floor of the packing room. A skid, used for the purpose of sliding filled sacks from the packing room into the loading room, extended from the bottom of this opening, downward and partly across the floor of the loading room, and rested upon a table therein. The workmen were in the habit of sliding down this skid from the packing room; and for about thirty years a ladder had been used by the defendant's employees in ascending from the lower to the upper room, through the opening referred to.

Some two years before the accident here involved, one of the defendant's foremen took the particular ladder in controversy from some other room in the mill and made it fit at this place, locating it so that it stood on the right side of the skid, facing the opening mentioned; the top part resting against a spout on the wall, and the left standard thereof being about four inches from the skid and a few

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inches below the bottom of the opening. The floor of the lower room was partly covered with sheet iron, and one side of the ladder rested thereon, while the other side (that nearest the skid) rested on the wooden floor and about four inches from the skid. When the ladder was first located at the place described it was in perfect condition, and was equipped with iron spurs about one inch long, fastened to the sides of the standards, and then brought to a point in the center of the bottom of the standards. In order that the spurs might take hold, and to prevent the ladder from "kicking back," and for safety, a small hole was cut in the sheet iron for one of the spurs, which was not pointed, to rest in, and on the other side the spur, which was pointed, was set in a depression in the wooden floor. Some two or three weeks before the accident the spike which rested on the wooden floor was broken off, and most of the other spike was gone. This ladder constituted the only direct way of going to the packing room from the loading room, and it was used for that purpose every day by the defendant's employees generally. The ladder itself was an ordinary portable one. It was set out of the way by the loaders occasionally, so that it would not interfere with their work, and sometimes it was temporarily pushed out of its location, but was restored thereafter to its usual position, and was used in this place only. The light in the loading room was good. Before the spikes were broken and worn off, the ladder stood solid; but thereafter it slipped sometimes.

The plaintiff, an intelligent man, forty-three years old, had worked around the defendant's mill for some eighteen years, and for about fifteen months out of the two years next prior to the time of the accident herein involved in the packing room as a packer, and had used this ladder several times a day during almost every day of such employment. On March 4, 1911, at about three o'clock in the afternoon, in the course of his employment and in line of his duty, he attempted to go up the ladder to the packing room. When he reached the top rung, and was about to step into the packing room, with his left foot forward, the ladder turned, and he was thrown therefrom to the

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floor, and received the injuries for which he seeks a recovery in this action.

1. The defendant insists that the plaintiff's claim is predicated upon a single specification of negligence, namely, that the defendant failed to furnish an instrumentality—a ladder—in good condition, and, having failed to prove this claim, but, on the contrary, having established that the ladder when originally furnished was in good condition, no cause of action was made out, and, furthermore, and because thereof, that the court submitted the case to the jury upon a theory and issue which was neither raised by the pleadings nor warranted by the facts.

Neither of these contentions can be sustained. The complaint charges, in effect, that while the plaintiff was in the employment of the defendant, in the capacity of a packer, the defendant owed him the duty of using reasonable care to prevent personal injury to him, and to furnish him with a safe place in which and safe appliances with which to work; that among the duties of the plaintiff in his employment was that of going up a ladder in the defendant's mill, and that the duty devolved upon the defendant to maintain such ladder in a safe condition so that the same would not slip or fall; that the lower end of this ladder was provided when new with spikes, and that it was the defendant's duty to maintain the spikes in such condition as to prevent the ladder from slipping and falling; but that it neglected such duty, and permitted the spikes, through long use, to become dull and broken, and in such condition that they would naturally slip upon the floor and cause the ladder to fall, and that in such worn, broken, and defective condition the defendant negligently furnished the ladder to the plaintiff as a ladder and an appliance to be used by him while he was working for the defendant. The court charged, among other things, in substance, that if the jury found from the evidence that the ladder was used generally by the defendant's workmen in passing between the loading and packing rooms, and was kept there for general use in that particular place, and not in any other, then it was the defendant's duty to use reasonable care to furnish to the plaintiff a reasonably safe place and means of going

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from the lower to the upper room, and a failure so to do would be negligence.

We think it is clear that the complaint alleges a failure on the defendant's part to use due care in furnishing the plaintiff with a safe place in which to work, because of this defective ladder, and that facts are therein stated, concerning which there is evidence in the record, sufficient to sustain the instruction given, provided, of course, that it states the law correctly. It may be admitted that the complaint also alleges a negligent failure, on the defendant's part, to provide a safe instrumentality, namely, the same ladder, for the plaintiff to use, and that he received injury therefrom; but this does not establish any part of the defendant's claim, or show that the first-mentioned cause of action was not pleaded, the only objection, if any, to which the pleading is open in this connection, being merely that it suggests a case where the plaintiff might, perhaps, have been compelled, on proper application, to elect between two theories, one involving the duty to furnish a safe place in which to work, and the other the duty to furnish safe appliances for the plaintiff's use (3 Dunnell, Minn. Dig. § 7536), which question, however, is not before us. Furthermore, considering as we must, that this is primarily a question of pleading, the result, under the evidence adduced on the trial, would be a mere variance, which, even if the defendant's point be well taken, would not be available to it, but would simply result in an amendment of the complaint on the trial or even after judgment. Adams v. Castle, 64 Minn. 505, 67 N. W. 637; Wilcox Lumber Co. v. Ritteman, 88 Minn. 18, 92 N. W. 472; Kaufman v. Barbour, 103 Minn. 173, 114 N. W. 738.

2. The defendant insists that the theory of the plaintiff's case, as presented to the jury in the instruction stated, is not tenable, because under the proofs the defective ladder was a simple hand tool, with the use of which plaintiff was fully conversant, and which was sound and in good condition for use when originally furnished, and hence that no duty was imposed upon the defendant to inspect it thereafter for the purpose of determining from its ordinary use if it required repairs. In other words, the defendant contends that the question of providing the plaintiff with a safe place to work is not here involved,

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and that the case comes squarely within the rule above stated concerning the furnishing and inspection of simple and commonly understood instrumentalities by the master, as declared in Koschman v. Ash, 98 Minn. 312, 108 N. W. 514, 116 Am. St. 373, and Dessecker v. Phœnix Mills Co. 98 Minn. 439, 108 N. W. 516, and as applied in Anderson v. Fred Johnson Co. 116 Minn. 56, 133 N. W. 85, and Wood v. Tileston, 182 Mass. 449, 65 N. E. 810.

We hold that the rule suggested does not apply to the instant case, and that the authorities relied upon by the defendant are not in point. Considering the long-continued, sole, and extensive use of this ladder as a means of ingress to the packing room, it must be taken, for all practical and legal purposes, as the equivalent of a stair. Plainly the defendant cannot justly complain if the ladder, which it installed in lieu of a stair, be held to be a stair in the contemplation of the law, with the same resultant duty on the part of the defendant to maintain and keep it safe as though it were in fact a stair. The instruction challenged was, therefore, correct, and it was a question for the jury, under the circumstances disclosed, whether the defendant used ordinary care in furnishing the plaintiff with a reasonably safe place to work; the ladder, when considered as a stair, being properly deemed to be a part of such place.

3. In addition to the facts above stated, it appeared that at the time of the accident there was a wooden spout in the loading room to the right of the ladder, which the plaintiff could have easily taken hold of, but did not, when he reached the upper part of the ladder. It also appeared that he made no inspection of the ladder before or while undertaking to ascend it, and made no special effort to conserve his safety while making the ascent. From these and other circumstances, not necessary to state, the defendant argues that the plaintiff was guilty of contributory negligence as a matter of law. We cannot agree to this. The plaintiff testified that he did not know that the spike was gone, and, further, that prior to the time of the accident the ladder had never slipped with him. Considering this evidence, and also the shortness of the ladder and the plaintiff's frequent use thereof, and that the burden of proof on this issue was

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on the defendant, the question as to whether he was guilty of contributory negligence was for the jury.

4. The defendant's final points are that the absence of the spur was not the cause of the plaintiff's injury, and that the plaintiff assumed the risk. These contentions have been considered, and, we think, require no discussion. We hold that they both involve jury questions.

We find no error. Judgment affirmed.

CHRISTIE LITHOGRAPH & PRINTING COMPANY v. AMERICAN BONDING COMPANY OF BALTIMORE.[1]

July 19, 1912.

Nos. 17,606—(140).

New trial — verdict not sustained by the evidence.

An order granting a new trial will be treated as made on the ground that the verdict is not sustained by the evidence, when the language of the order or of the memorandum clearly shows the new trial to have been granted on that ground, though the fact is not therein specifically stated.

No abuse of discretion.

The evidence in this case was not manifestly and palpably in favor of the verdict, and it was not an abuse of discretion to grant a new trial.

Action in the district court for St. Louis county to recover $29,313 upon a contractor's bond. The complaint, among other matters, alleged the making of a building contract, and the giving of the bond with defendant as surety; that the contractor was duly adjudged a bankrupt in the Federal court; that defendant did not elect to and did not complete the contract. The answer alleged upon information and belief that no plans or specifications were ever signed or agreed

[1] Reported in 137 N. W. 188.

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upon or identified so as to become a part of the contract, and the character and extent of the work to be done at all times rested in parole; that the building was not constructed according to the plans and specifications prepared by the architects and furnished to the contractor as a basis for making his bid, but was constructed upon other and different plans and specifications.

The case was tried before Dibell, J., and a jury which returned a verdict in favor of defendant. From an order granting plaintiff's motion for a new trial, defendant appealed. Affirmed.

Fitzhugh Burns and *Washburn, Bailey & Mitchell,* for appellant.

Thomas J. Davis and *J. A. P. Neal,* for respondent.

BUNN, J.

This action was brought to recover on a contractor's bond given to plaintiff by John W. Hilliard, as principal, and defendant, as surety. The defense was that Hilliard was induced to enter into the contract with plaintiff, and the defendant induced to execute the bond, by fraudulent representations of plaintiff as to the bids received for the contract. The case was tried, and a verdict returned in favor of defendant. The trial court granted a new trial, and defendant appealed from the order.

1. The first contention of defendant is that the order granting a new trial was not a discretionary order, because it was not specifically stated by the trial court, in the order or in its memorandum, that the new trial was granted on the ground that the verdict was not sustained by the evidence. We do not sustain this contention. While the memorandum does not so specifically state, it is perfectly clear, from the court's discussion of the evidence, that the new trial was granted on the sole ground that, in the court's opinion, the verdict was not justified by the evidence. The order was a discretionary one. Gay v. Kelley, 109 Minn. 101, 123 N. W. 295, 26 L.R.A.(N.S.) 742; Hess v. Great Northern Ry. Co. 98 Minn. 198, 108 N. W. 7, 803.

2. Was the evidence manifestly and palpably in favor of the verdict, so that granting a new trial was an abuse of discretion? A

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brief statement of the facts is all that is necessary to show that the order was well within the court's discretion.

Plaintiff received bids for the construction of a building. Hilliard was the lowest bidder, and was awarded the contract. He made application to defendant in writing for a bond. This application contained, as it was required to do by defendant, certain information, including, among other things, the total contract price and the names of the other bidders on the contract, including the highest and lowest. This was stated in the application as follows:

"Other bidders on above contract, including highest and lowest:

Name	Address	Bid
John W. Hilliard	Duluth	$58,626.
H. Grant	.....	62,223.
Geo. H. Lounsberry	Duluth	66,000."

It appeared from the evidence that the George J. Grant Construction Company of St. Paul had made a bid of $69,237. It did not appear who H. Grant was, or that he had actually made a bid, though there was testimony that there was one bid of between $62,000 and $63,000. The statement as to the bids, contained in the application, was inserted by defendant's agent at Duluth. He claimed that he obtained the information from Mr. Christie, the president of plaintiff; but this was disputed by the latter. The application was sent to the representative of the company at St. Paul, and it is claimed and was testified to by him that the company relied upon the bid of "H. Grant," supposing it to be the bid of the George J. Grant Construction Company. Defendant had been informed that the Grant Company intended to bid for the contract, but made no inquiry to verify its supposition that the bid of "H. Grant" was the bid of the George J. Grant Construction Company, though the officers of this company reside in St. Paul and were personally known to defendant's representative.

The above statement of facts is all that is necessary to show that the trial court was fully warranted in granting a new trial. Defendant had the burden of proof, and in order to prevail was obliged to

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show fraudulent misrepresentations on the part of plaintiff. Clearly plaintiff was not bound to furnish the information, and would only be liable in the case of intentional misrepresentations. The evidence as to what information plaintiff furnished was conflicting. It is not easily perceived what motive plaintiff could have had for stating wrongly the names of the bidders or the amounts of their bids. We are clearly of the opinion that the evidence was such on the vital question of whether plaintiff made the misrepresentations that the trial court was fully justified in concluding that the issue ought to be submitted to another jury.

Order affirmed.

GEORGE JACOBSON v. COUNTY OF LAC QUI PARLE and Another.[1]

July 19, 1912.

Nos. 17,618—(178).

Ditch assessment — action to enjoin enforcement.

The plaintiff, in an action to vacate a ditch assessment and to enjoin the enforcement thereof, stands, at most, in no better position to attack such assessment than he would if he were objecting to the entry of judgment on the first instalment thereof, under R. L. 1905, § 919.

Defenses to assessment.

R. L. 1905, § 919, relative to defenses which may be made upon an application for judgment on a tax assessment, applies to ditch assessments.

Confirmation of assessment conclusive, when.

In the absence of an appeal, and of fraud or demonstrable mistake, the county board's confirmation of a ditch assessment, made under R. L. 1905, § 2586, et seq., is conclusive of the utility of the ditch and the benefits conferred thereby.

Complaint insufficient against demurrer.

Complaint in an action to vacate a ditch assessment *held* to allege neither fraud nor demonstrable mistake, and to be obnoxious to a general demurrer.

[1] Reported in 137 N. W. 419.

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Action in the district court for Lac qui Parle county to set aside an assessment and to enjoin the county auditor from filing a lien statement in the office of the register of deeds as a lien against plaintiff's land, and that, if the lien statement be so filed before the determination of the action, that the lien and cloud created thereby be removed. From an order, Qvale, J., sustaining defendants' demurrer to the complaint, plaintiff appealed. Affirmed.

A. W. Ewing and *H. O. Halvorson,* for appellant.

N. F. Soderberg, for respondents.

Philip E. Brown, J.

Action to vacate and set aside a ditch assessment against the plaintiff's lands, situated in Lac qui Parle county, and to enjoin the county auditor from filing a lien statement, and, in case such statement is so filed before the determination of the action, to remove the cloud created thereby, and for general relief. From an order sustaining a general demurrer to the complaint, the plaintiff appeals.

The complaint alleges the due establishment of the ditch by the board of county commissioners on November 19, 1909; that three forties of land then owned by the plaintiff were affected thereby; the construction of the ditch so far as it affects the plaintiff's lands referred to; and the execution by the county auditor of a lien statement against the said lands, as provided by law. No complaint whatever is made of any irregularity or omission in the ditch proceedings; the sum and substance of the cause of action relied on being that the ditch fails to furnish the drainage contemplated and intended at the time of the making of the assessments, and that such failure of utility and consequent alleged wrongful assessment is not the result of a mere misjudgment of the assessing power, but that the error in the assessment is so gross that it must have resulted from a demonstrable mistake, and that hence the plaintiff is entitled to the relief demanded. In other words, it is variously alleged, with respect to the said land owned by the plaintiff and affected by and assessed for the drain, that such drain does not furnish drainage for the surface water upon the said lands, and is not low enough to afford any subdrainage thereto; that the branch drains are too small to carry off all the water dur-

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ing wet seasons; that the land is now no better drained than before the ditch was constructed; that the viewers, in making the assessment, were informed by the engineer that the ditch would thoroughly drain the land and make it first-class tillable agricultural land, and that the said assessment was so made by the viewers and confirmed by the county board under a mistake of fact in relation thereto, and upon the basis, belief, and presumption that the said lands would be thoroughly drained, but that in fact the said ditch is of no benefit to the lands so assessed; that in wet seasons and rainy spells, and during the melting of the snow in the spring of the year, a large amount of water is discharged from a natural watershed in a natural watercourse upon the plaintiff's lands, that no provision is made for caring for this water, and that the plaintiff's assessed lands are still subject to overflow, the said ditch not being so constructed as either to take care of this water before it reaches the plaintiff's lands or thereafter; that at the time of the survey for the said ditch, and the branch thereof which enters the plaintiff's lands, a survey was made for another branch across certain low portions of the said lands, and stakes were set marking the course of such survey, which stakes were in the ground and visible when the view of the premises was made by the viewers, and that their assessment was made in the belief, and relying on the said proposed survey, that an additional branch, as surveyed and marked on the ground, should be constructed for the purpose of draining the said low land and to take care of the watershed to which the plaintiff's land is servient; that the plaintiff was informed and believed that the said branch would be built, and did not learn the contrary until long after the time for appealing from the assessments had expired; that he relied thereon, and upon the surveyor's assurance that it would be built, at the time of the confirmation of the assessment by the county board, and, further, that he relied upon the presumption that the drain to be constructed would drain his land, and did not discover the contrary until too late to appeal from the assessments; that the viewers, in assessing the benefits, did not base the assessment upon the true facts as to utility of the ditch, but based such assessment of benefits upon the mistaken belief of the engineer and themselves as to the utility of the ditch, and upon the

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mistaken belief that such other branch was to be constructed, and upon the mistaken belief that the ditch would thoroughly drain the plaintiff's lands; that the said assessments were made and confirmed by the county board under all of the said mistakes of facts, with the result that the plaintiff's lands have been unequally and partially assessed, which assessments, if permitted to stand, will compel the plaintiff to pay the same without compensation; that by reason of scarcity of rainfall in the previous years the plaintiff did not know until September, 1911, that the ditch was inadequate and useless, which fact he then learned by having a survey made by a "competent engineer;" that the county auditor's lien statement, when filed, will be a lien on the plaintiff's lands, etc.; that the assessment will be payable in ten equal instalments, and to defend the same in proceedings to enforce the payment of such instalments will result in a multiplicity of suits; and that the defendant has no adequate remedy at law.

1. Probably, aside from the allegation of multiplicity of suits, the plaintiff's remedy, if any he has, is under R. L. 1905, § 919. See Schumacher v. Board of Commrs. of Wright County, 97 Minn. 74, 105 N. W. 1125; State v. Johnson, 111 Minn. 255, 126 N. W. 1074; Lindbergh v. County of Morrison, 116 Minn. 504, 134 N. W. 126. But since it would be, in a sense, futile to deny the right of the plaintiff to equitable relief and send him back to another action, and also in view of the fact that a general demurrer only was interposed, we will assume, without deciding, that the plaintiff has a standing to ask for equitable relief, if entitled to any relief at all, and will determine the case upon its ultimate merits, without reference to the form of the remedy.

The question then is: Does the complaint state grounds for either equitable or legal relief, or for any relief in any form of action or proceeding known to our law?

Clearly the plaintiff stands in no better position to object successfully to this entire tax in this action than he would, were he objecting to the entry of judgment on the first instalment thereof under section 919 of the tax law. Recognizing, then, on the authority of State v. Johnson, supra, that the said section 919 applies to ditch assessments,

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and, on the authority of the same case, that under such section the landowner is precluded by the ditch proceedings only as to matters going to the regularity thereof, and not as to matters affecting the merits of the tax, and, on the authority of County of Otter Tail v. Batchelder, 47 Minn. 512, 516, 50 N. W. 536, that upon an application for judgment the landowner might, under said section 919, show a "demonstrable mistake of fact," yet we do not think the plaintiff here has made any case by his complaint.

The ditch proceedings were in rem (McMillan v. Board of Commrs. of Freeborn County, 93 Minn. 16, 100 N. W. 384), were concededly regular, and there was full and complete jurisdiction. The plaintiff, in short, seeks merely a review of those very matters which were, of necessity, determined by the county board in the proceedings to establish the ditch, and upon which the plaintiff could and would have been heard, had he seen fit to interpose his objections therein; and, though he insists that he did not discover his grounds of complaint until after the assessments had been made, it seems to us clear that the objections are not of a kind that can be made after the county has incurred the expense of constructing the ditch, for the objections are grounded upon matters which were necessarily involved in the original petition, the report of the viewers, and the order establishing the ditch. If matters of this kind were open to question under section 919, the result would be that the merits of ditch assessments would have to be retried every time any landowner saw fit to object to an application for judgment upon an assessment on the ground that the ditch did not perform the function anticipated, and we do not deem this to be the law. Thompson v. County of Polk, 38 Minn. 130, 36 N. W. 267; Slingerland v. Conn. 113 Minn. 214, 129 N. W. 376; Dalberg v. Lundgren, 118 Minn. 219, 136 N. W. 742. To permit a party to make this defense to a tax imposed to defray the expenses of a ditch under circumstances here alleged, would often, as stated in State v. Johnson, supra, "result in transferring the burden from those who received all the benefit to those who received none."

The allegations of the complaint show a mere error of judgment, if it may be said that any mistake at all is alleged, and such is not

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the demonstrable mistake of fact of which the landowner may complain. See State v. Board of Public Works, 27 Minn. 442, 8 N. W. 161. The statute (R. L. 1905, § 2587) requires that the petition to establish the ditch shall fully describe the ditch, that the engineer shall make complete and elaborate plans and specifications, based upon his survey (section 2588), and shall make a complete report of his proceedings, and the viewers are then appointed and proceed to estimate the benefits, etc. (Section 2590.) It must be held, therefore, that after the making of the order establishing the ditch the assessment should be conclusively presumed to have been made on the basis of the engineer's survey and report, and not on his declaration or upon other collateral matters. And if the plaintiff, as alleged, did not discover his grounds of complaint until too late to urge them in the ditch proceedings, the same must have been due either to his neglect or to circumstances against which the statutes have not undertaken to provide. The matter of the sufficiency of a drain and the resulting benefits therefrom must necessarily depend upon estimates and judgment formed before such matters have been tested by actual results, and, in the absence of fraud or mistake other than of judgment, such matter is concluded by the ditch proceedings. No fraud is expressly alleged by the complaint, nor is there any allegation therein upon which such a charge can be predicated.

Having determined that, so far as shown by the allegations of the complaint, there was no such mistake of fact in making the assessment here involved, and no fraud, nor any ground of complaint which would be available to the plaintiff in any proceedings of whatsoever nature, the plaintiff's allegations relative to his reasons for not appealing are rendered immaterial. The time for taking an appeal cannot be extended. 1 Dunnell, Minn. Dig. § 318.

Order affirmed.

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ANNA E. P. HARRIS v. R. HANSON and Others.[1]

July 19, 1912.

Nos. 17,620—(168).

Foreclosure of mortgage — decision sustained by evidence.

Action to foreclose a real estate mortgage, which the defendants claimed had been paid. The trial court so found, and as a conclusion of law judgment was directed for them. *Held*, that the finding was justified by the evidence, that the conclusion was correct, and, further, that there were no errors in the rulings as to the admission of evidence.

Action in the district court for Clay county to recover $2,000 upon a mortgage, together with an attorney's fee, and for a sale of the mortgaged premises to pay plaintiff the amount claimed. The answer of defendants Hanson alleged that the premises were conveyed by them to one Poehler, that he assumed and agreed to pay the mortgage, and that he conveyed the property to defendants Year and Martin. The answer of defendants Year and Martin alleged that Philip Allen, Jr., was appointed one of the executors of the estate of Elizabeth Necollins about July 1, 1904; that on May 27, 1909, these defendants paid the note to said Allen, without knowledge or notice of any defect of title or authority in Philip Allen, Jr., to receive said payment; that the note and mortgage were then and there delivered to defendants, and a satisfaction of the mortgage. The case was tried before Taylor, J., who made findings and conclusions of law as stated in the opinion. From the judgment entered pursuant to the findings, plaintiff appealed. Affirmed.

Edgar E. Sharp, for appellant.

James D. Denegre and *Engerud, Holt & Frame,* for respondents Year and Martin.

Christian G. Dosland, for respondents Hanson.

START, C. J.

Appeal by the plaintiff from a judgment of the district court of

[1] Reported in 137 N. W. 166.

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the county of Clay in an action to foreclose a real estate mortgage which the defendants claimed had been paid. The action was tried by the court without a jury, and findings of fact made to the effect following:

On March 17, 1902, the defendants R. and Gunil Hanson executed to Frank O'Meara their promissory note for $2,000, due in five years, with interest at six per cent, payable annually, and secured the payment thereof by a mortgage, duly recorded, on a quarter section of land in the county of Clay then owned by them. On March 20, 1902, O'Meara sold and assigned the note and mortgage to Mrs. Elizabeth Necollins, of Mineral Point, Wisconsin. The contract for the sale and purchase of the mortgage was not made with Mrs. Necollins personally, but with her agent, John Allcock, of Platteville, Wisconsin, and her nephew, W. J. Jennings, of the same place. The note, mortgage, and assignment were delivered to Allcock as such agent, and O'Meara received from him the purchase price thereof. The assignment was duly recorded. All subsequent transactions between O'Meara and the several owners of the note and mortgage were with Allcock only, and in the belief that he had full authority to act for them. On July 17, 1902, the mortgagors, R. and Gunil Hanson conveyed the land to the defendant Poehler, of Iowa, who assumed and agreed to pay the mortgage. On September 21, 1908, he conveyed the land to the defendants Year and Martin subject to the mortgage. On January 12, 1904, Mrs. Necollins died testate. Her will was duly admitted to probate in the county court of the county of Iowa, Wisconsin, on June 28, 1904, and Philip Allen, Jr. and W. T. Jennings were duly appointed as executors thereof, and letters were issued to them. A final decree in the estate was made July 5, 1905, whereby the residue of the estate, in accordance with the terms of the will, was assigned to Allen and Jennings as trustees for the plaintiff and her brother until they respectively should attain the age of twenty-one years.

During all the times herein stated Allen was the vice president and managing officer of the First National Bank of Mineral Point, and

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continued so to be until its failure as hereinafter stated. The securities belonging to the estate and the trust fund, including the note and mortgage in question, were kept in the vault of the bank in a tin box belonging to Allen, the key to which was kept by him. After the trust terminated, and on December 17, 1906, the trustees had a full accounting and settlement with plaintiff of all the matters pertaining to the trust, and received from her a receipt to the effect that she had received from them the sum of $13,383.40 in full settlement of the amount due her. The plaintiff at the time of such settlement received from Allen a receipt, signed by him, as "Phil Allen, Jr., Vice Pres.," for securities for safe-keeping aggregating $12,500, which included the Hanson note and mortgage. Never at any time prior to the failure of Allen and the bank did plaintiff examine such securities or take the same into her physical possession, but during all such time she permitted the same and all thereof to remain in the bank in the tin box belonging to Allen, and to which he alone possessed the key. Other than this, the note and mortgage were never assigned or delivered to her.

Until March, 1906, all interest on the note and mortgage, as it became due, was paid by the respective owners of the land to O'Meara, who forwarded it to Allcock. Allcock paid it to Jennings, and received from him the interest coupons. After the last date Jennings moved from Wisconsin, and directed Allcock to remit the interest, when paid, to Allen, which was thereafter done. When the mortgage became due in 1907, Poehler requested an extension, and it was granted by Allen, through the medium of O'Meara and Allcock, each of whom knew that Allen was such executor. The interest coupons taken on the extension were paid as they became due to Allen, through O'Meara and Allcock. When the note and mortgage as extended became due, the then owners of the land, the defendants Year and Martin, applied to O'Meara for a further extension, who sent the application to Allcock. Allcock then sent it to Allen, who refused to grant it.

Thereafter, and on May 19, 1909, Year and Martin caused to be forwarded to O'Meara the full amount due upon the mortgage, which was received by him, who prepared a form of satisfaction of the mortgage for execution by Allen as administrator of the estate of Necollins,

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deceased, and forwarded the same, together with the money, to Allcock, who transmitted by mail the satisfaction to Allen, with a request to execute, acknowledge, and return it, with all the papers to him. Upon the receipt of the satisfaction, Allen executed it as executor of the estate of Mrs. Necollins, and forwarded the same, together with the note and mortgage, the assignment thereof to Mrs. Necollins, a certified copy of the letters testamentary issued to himself and Jennings as executors of her estate, and the abstract of title to the State Bank of Platteville, accompanied by a letter whereby he directed the bank to deliver all the papers to Allcock upon payment by him of $2,020.58. This amount Allcock paid to the bank, and received from it all the papers and forwarded them to O'Meara, who delivered them to Year and Martin.

Prior to the year 1907 Allen had been discharged as executor of the estate of Mrs. Necollins and as trustee of the property of plaintiff, and when he made the agreement extending the time for the payment of the mortgage, and also when he executed the satisfaction thereof, he had no authority, either as executor or administrator of the estate of Mrs. Necollins, deceased, or as trustee of property of plaintiff, to execute the same, or either thereof. The plaintiff never at any time, prior to the failure of the First National Bank of Mineral Point, had any notice or knowledge that Allen ever assumed or pretended to act as executor or administrator of the estate of Mrs. Necollins, or as trustee of any property of plaintiff after he had been discharged as such trustee in December, 1906. Prior to the failure of the bank the plaintiff had never examined said note and mortgage, and did not know when they became due, nor that Allen had assumed to extend the time of payment thereof, nor that the same had been paid, nor that Allen had assumed to execute a satisfaction of the same. On the other hand, neither Allcock nor O'Meara, nor any of the defendants herein, had any notice or knowledge that Allen had been discharged as executor of the estate of Mrs. Necollins, or that he had been either appointed or discharged as trustee of property of plaintiff herein, or that the note or mortgage had been transferred to or become the property of plaintiff, until after the failure of the bank. Allcock, O'Meara, and each and all of the defendants herein believed in good

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faith that Allen was the executor or administrator of the estate of Mrs. Necollins and had full authority to act as such. All the transactions of each and all the defendants concerning the note and mortgage were had with O'Meara only, and with no one else, and in good faith in the belief at all times on the part of each and all the defendants that O'Meara was the agent of, and had full authority to act for, the holder of the note and mortgage.

All the payments upon the note and mortgage received by Allcock subsequent to the year 1905 were paid over to Allen in the belief that Allen was still the executor or administrator of the estate, and when the interest and the principal were so paid the coupons and the note and mortgage were surrendered. The plaintiff, except as hereinbefore stated, left her securities with Allen, as vice president and managing officer of the bank, for the purpose of collecting the interest thereon as it became due and credit it to her account with the bank. All of her transactions with the bank were with Allen, and no one else, and with her full knowledge he collected the interest on the note and mortgage and credited the same to her account on the pass book. The matter of his collecting or receiving payment of the principal of the securities was never referred to by either of them; but he collected $300 of the principal of one of the securities, other than the one here in question, with her full knowledge, and without objection. Allen never credited the plaintiff's bank account or paid to her the amount of the note and mortgage so paid to him, but converted it to his own use or that of his bank, which became insolvent and failed. Both it and Allen are still insolvent.

The trial court, as a conclusion of law from the evidentiary facts stated, found that the note and mortgage had been paid, and directed judgment for the defendants. The finding that the note and mortgage had been paid, although expressed in the conclusions of law, is a finding of the ultimate fact of payment.

The plaintiff's assignments of error are logically divided into three groups, and raise the questions: Did the trial court err in its rulings as to the admission of evidence? Are the evidentiary facts found jus-

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tified by the evidence? If so, do they sustain the finding of the ultimate fact of payment and the conclusion of law?

The alleged errors as to the admission of evidence are based upon the rulings of the court in receiving evidence on behalf of the defendants tending to show payment of the note and mortgage. The plaintiff's contention is that all the transactions shown by the evidence were without her knowledge, consent, or authority; hence it was error to receive the evidence. The very purpose of the evidence, direct and circumstantial, offered and received, was to show payment under such circumstances as to bind the plaintiff. We are of the opinion that the evidence was properly received, as it tended to show such a payment.

The plaintiff also contends that the trial court's finding that the plaintiff permitted her securities to remain in Allen's exclusive possession is not sustained by the evidence. Her testimony as to this particular matter must be considered in connection with the evidence as to her own acts, and Allen's, so far as she had knowledge thereof. Upon a consideration of the whole evidence, we are of the opinion that all of the findings of evidentiary facts, which the plaintiff here challenges as not justified by the evidence, are fairly sustained by it.

The last question to be considered, and the important and controlling one, is whether the evidentiary facts found justify the finding of fact and conclusion of law that the note and mortgage had been paid. This question was exhaustively discussed in the briefs of the respective counsel, which we have attentively considered. We do not, however, deem it necessary or advisable to discuss in detail all of the propositions of fact and law urged on behalf of the plaintiff.

The contention of the plaintiff that the note and mortgage were left by her with the bank, not with Allen, for safe-keeping, and that he stole them and received the principal thereof without any authority from her, is not sustained by the record. The note and mortgage were left with Allen as vice president of the bank; but this is not of controlling importance, for it is clear, both from the evidence and the findings of fact, that Allen, either personally or as vice president of the bank, was, with full notice and knowledge of the plaintiff, the

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sole individual or officer who received them and was authorized to transact the business connected therewith. Either personally or as an officer of the bank, he had exclusive possession of the securities to the knowledge of the plaintiff, and the fact that they were in the custody of the bank was not known to any of the defendants. There is neither evidence nor finding that Allen stole the securities from the bank or any one else. It is true there was an immaterial finding to this effect: The details concerning the failure of the bank are not made clear by the evidence. It, however, appeared that Allen, in popular parlance, wrecked the bank and is now serving a sentence of imprisonment for having violated the Federal banking laws. This falls short of a finding that he stole the securities.

It is conceded by the defendants, as it must be, that there was no express authority given Allen to receive payment of the principal of the note or mortgage. Nevertheless the fact remains that the evidence and evidentiary facts found justify the conclusion that she conferred upon Allen complete apparent authority to receive such payment, and, further, that the defendants were fully justified in acting thereon and paying the principal to him upon the delivery of the securities and a satisfaction of the mortgage sufficient upon its face.

The suggestion that the defendants were negligent in the premises is without merit. The defendants had no notice or knowledge of any kind that the plaintiff owned the note and mortgage, as she placed nothing on record to show that she had any interest therein, nor did she give any notice of any kind that she owned the securities.

We accordingly hold that the findings of the ultimate fact that the note and mortgage had been paid is sustained by the evidence, and that the trial court's conclusion of law was correct.

Judgment affirmed.

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DORA V. BENJAMIN v. NORTHWESTERN FIRE & MARINE INSURANCE COMPANY.

GEORGE G. BENZ and Another v. DORA V. BENJAMIN.[1]

July 19, 1912.

Nos. 17,630, 17,631—(192, 193).

Lease construed.

The owner leased certain real property for the term of one hundred years. Subsequently, before the expiration of the lease, he leased it to another for the term of one thousand years; the term thereof commencing immediately. The second lease is construed, and *held* to have been a grant in præsenti, and to vest in the second lessee the control of the property, and the right to the rents and profits issuing therefrom.

Actions in the district court for Hennepin county, one by Mrs. Benjamin to recover from the insurance company $200 advance instalment of rent due under her lease on March 8, 1911; and the other by the Benzes against Mrs. Benjamin to recover the advance instalment of rent due on June 8, 1911, which the insurance company had deposited with the clerk of that court. The answer of the insurance company in the first action admitted the making of the one hundred year lease and its assignment to the answering defendant; the making of the one thousand year lease to plaintiff subject to the former lease, and the sale of the premises, and assignment of the lease to the Benzes, demand by the Benzes and Benjamin for the payment and its willingness to pay to whomever might be entitled to it. The reply admitted the conveyance to the Benzes, and alleged that it was subject to her lease and her rights thereunder. The Benzes filed a complaint in intervention in the first action.

The cases were tried before Holt, J., who made findings and as conclusions of law ordered judgment in each case in favor of Mrs. Benjamin. Motions of the Benzes for new trials were denied, Dickinson, J.

[1] Reported in 137 N. W. 183.

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From orders denying the motions for new trials, the Benzes appealed.

Affirmed in each case.

John F. Fitzpatrick and *D. E. Dwyer,* for appellants.

Simon Meyers, for respondent Benjamin.

BROWN, J.

Levi M. Stewart in his lifetime owned certain real property in the city of Minneapolis, and in the year 1892 sold the building situated thereon to James H. Bishop and others, and at the same time, and as a part of the same transaction, executed to them a ground lease of the land for the term of one hundred years. The contract provided for a yearly rental of $1,000 for the first five years, payable quarterly in advance, and imposed also upon the lessees the obligation of paying all taxes and assessments against the property. It further provided that at the end of the first five-year period, and at or near the end of each succeeding five-year period, there should be a readjustment of the rent to be paid, in the manner and upon the basis therein mentioned. A subsequent readjustment was had, as so provided for, and at the time the controversy in this action arose the successors of the lessees were paying rent at the rate of $800 per year. The lease was duly recorded in the office of the register of deeds for Hennepin county on June 16, 1892. In March, 1906, the lessees, Bishop and others, assigned and transferred the lease, and all their rights and interests therein, to the Northwestern Fire & Marine Insurance Company, a corporation, defendant herein, and that company thereby assumed all obligations imposed by the contract upon their assignors. Since that transfer the insurance company has remained and still is in possession of the property, paying, as heretofore stated, rent at the rate of $800 per year, quarterly, and the lease is in full force and effect.

Thereafter, and in April, 1910, Stewart executed and delivered to plaintiff, Dora V. Benjamin, a second lease of the same premises for the term of one thousand years, at the annual rental of $900 per year, payable quarterly in advance. The lease was substantially like the former lease to Bishop, except that a readjustment of the rent to be paid was required to be made at intervals of ten years, which, as in the other lease, was to be based upon the valuation of the land exclu-

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sive of buildings. By the terms of the prior lease, when the parties failed to agree upon terms of readjustment, the rent was fixed upon the basis of six per cent of the valuation of the property, determined in the manner therein provided. In the second lease the basis of the rent was five and one-half per cent of such valuation. So that in the course of a short time the second lessee would have the benefit of the difference. The second lease was expressly made subject to the prior lease, and provided for the payment of the stipulated rent of $900 per year in quarterly instalments, and also the payment of all taxes and assessments against the land. It was duly recorded in the office of the register of deeds. At the time this lease was executed, Stewart delivered to plaintiff a written document in and by which he directed all tenants then in possession of the premises under the prior lease to pay to plaintiff, Mrs. Benjamin, all rent and taxes accruing after March 7, 1910.

Stewart died on May 3, 1910, leaving a last will and testament by which he disposed of all his property. David D. Stewart and Charles Morse were duly commissioned executors of the will, and on April 18, 1911, under license of the probate court, sold and conveyed the property covered by the leases to John and Samuel Friedman. This conveyance by its terms was expressly made subject to all rights under the existing leases, which were, together with all rights thereby conferred upon the lessor, Stewart, assigned as part of the transaction of sale, to the Friedmans. The deed and lease assignments were duly recorded. Thereafter the Friedmans entered into an executory contract for a sale of part of the premises to one Samdal, for the expressed consideration of $303,000, which Samdal subsequently assigned to defendants George G. and Herman L. Benz. This contract was thereafter, on March 8, 1911, fully performed by the conveyance of the property to the Benzes; the executory contract and the deed of conveyance being expressly made subject to the existing leases, which were both assigned to them. The rent under the second lease fell due on the first days of March, June, September, and January, and fell due on the prior lease on the eighth days of these months.

After the death of Stewart, which occurred about six weeks after the execution of the second lease, Mrs. Benjamin regularly paid to

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the executors the rent due under the second lease, namely, $225 per quarter. Some doubt arose on the part of the officers of the insurance company, tenant under the first lease, respecting the rights of Mrs. Benjamin, and they insisted upon paying the rent to the executors. The executors received it when due, on the eighth of the month, but immediately paid it over to Mrs. Benjamin. So that Mrs. Benjamin paid the rent due under her lease on the first of the month, and the executors returned to her on the eighth the amount paid by the insurance company. After the conveyance of the property to the Benzes, a further question arose as to the rights of Mrs. Benjamin, they insisting that she had no present estate or interest under her lease, and they demanded payment of the rent under the first lease direct to them. Mrs. Benjamin also demanded this rent, offering to pay to Benz, as she had theretofore paid to the executors, the rent called for by her lease. In view of these conflicting demands, the insurance company declined to pay it to either, and these actions were brought to recover the same, and to determine the respective rights and liabilities of the parties.

The action wherein Mrs. Benjamin is plaintiff involves the rent due March 8, 1911, and the action wherein George G. and Herman L. Benz are plaintiffs, and Mrs. Benjamin is defendant, involves the rent due June 8, 1911. The same questions are presented in each case. The trial court, upon the facts stated, held that Mrs. Benjamin had a present vested interest in the property, a right to collect the rent due from the insurance company, and judgment was awarded in her favor accordingly. A motion for a new trial in each action was made and denied, and the Benzes appealed.

1. The contention of appellant, aside from the errors urged in support of the motion for a new trial, is that the lease to Mrs. Benjamin vested in her no present estate or interest in the property, that she acquired at most rights to accrue in the future, and is not entitled to the rent due under the prior lease. This is founded upon the general rule that, where the owner of real property grants to one person the right of possession for a term of years and subsequently leases the property to another, to commence at the expiration of the first grant, no reversion or other present right passes to the second lessee,

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except the right of possession in the future, leaving the lessor in control of the property, with the right to collect and receive the rents, issues, and profits accruing therefrom. The situation thus created is termed an interesse termini. 1 Taylor, Landlord & Tenant (9th Ed.) 72. Whether the rule applies to the case at bar is the principal question before us.

The question is solved, it would seem, by an answer to the further question whether the parties intended the second lease to go into effect presently, or that the operation thereof should be postponed until the expiration of the term of the first lease, then having eighty-two years to run. If we take into consideration the written document issued by Stewart simultaneously with the second lease, by which he directed the tenants to pay their rent to the second lessee, the question is entirely free from doubt. That document conclusively shows that a present vesting of reversionary rights in Mrs. Benjamin was intended. But counsel for appellant contend that the Benzes occupy the position of subsequent bona fide holders of the legal title, and, inasmuch as they had no notice of the document referred to before acquiring their title, they are not bound thereby. The document so directing the payment of rent to Mrs. Benjamin was not recorded, and it does not appear that notice thereof came to appellants prior to their purchase of the property.

We find it unnecessary to determine whether knowledge of the second lease, which was of record and subject to which appellants acquired their title, was constructive notice of Mrs. Benjamin's right to collect and receive the rent from the prior tenant, as evidenced by this separate writing. We dispose of the question presented from the legal effect of the lease itself and without reference to that document.

The validity of the second lease, as a matter of law, cannot seriously be questioned. The parties were competent to enter into the contract, and the forms of law were complied with. In the case of Cohen v. Suckno, 32 Misc. 689, 66 N. Y. Supp. 467, apparently holding to the contrary, the question was not very seriously considered, and the decision there made is not in our view of the matter supported on principle. No law was violated by the execution of the contract, and it must be held valid, whether it be construed as taking effect at the

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time of its execution, or at the expiration of the prior lease. The important question is whether the second lease took effect and went into operation at the date of its execution; for, if it did not, then it is clear that Mrs. Benjamin has no claim to the rent due under the former lease.

The question is one of intention. Did the parties intend the second lease to go into effect as of the date of its execution? That such was the intention seems clear. The lease not only contains words of a present demise, presumptively a grant in præsenti (Potter v. Mercer, 53 Cal. 667), but expressly imposed present obligations and duties upon the lessee with respect to the property. Its language on the subject of the term of the lease namely, "to have and to hold said demised premises * * * from the first day of March, A. D. 1910, until the first day of March, A. D. 2910, being for the term of one thousand (1000) years," is clear and unambiguous. In addition to this specific designation of the term, the lease further obligates the lessee to pay all taxes and assessments against the property, "beginning with the taxes of 1909," and the sum of $900 a year as rent, "in equal, advance, quarterly payments, on the first day of the month of March, June, September, and December, in each and every year during the first ten (10) years of said term," and thereafter at the readjusted rate. It also imposes upon the lessee certain duties in reference to the care of the property, requires her to keep the same insured, maintain the same in a sanitary condition, and to indemnify and save harmless the lessor from the consequences of any default of compliance with the obligations thus imposed, and, further, "that during the whole of said term" the lessee shall not permit or tolerate the sale of intoxicating liquors upon the premises, and, finally, the lessee covenants and agrees "to pay to the said lessor personally at his office the rents hereintofore and hereby reserved, at the time and in the manner herein specified, without any demand, deduction, or delay." For any default in the performance of the obligations thus assumed by the lessee, the lessor may, at his option, terminate the lease.

A careful examination of the lease discloses no provisions in conflict or at variance with those recited, or from which it might fairly be inferred that the parties intended that the obligations imposed

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were not to become presently binding upon the lessee. The language of the lease is too explicit to admit of a construction to the effect that the parties intended the lease to go into effect and operation eighty years in the future. To so construe it would reduce the contract to an absurdity, and render the transaction a meaningless ceremony. It is true that the lease was expressly made subject to the prior lease and all the rights thereunder, and that no right of present possession was granted the second lessee. But from this it does not necessarily follow that no rights were vested in the second lessee. It gave to the lessee the present control of the property, and imposed upon her present duties and obligations respecting its care, and in effect vested in her all rights in that respect which the lessor possessed. She could enforce a default of the prior tenant to perform the conditions of the first lease, cancel the same, and take possession of the property; or, if the first lessee vacated the property, the right of immediate possession would pass to her, and no proper construction of the contract would enable the lessor to prevent her full and free occupancy thereof. From all this it necessarily follows that the second lease was valid in law and operated to vest in Mrs. Benjamin rights in præsenti. We so hold.

We are not required to consider or determine the full extent of the rights and obligations of the second lessee. Whether it was within her power to comply with all the conditions of the contract is not here important. The only question now before us is whether she is entitled to the rent due under the first lease. We think the legal effect of the contract extended to her that right, and that such was the intention of the parties. The rental value of the property did not exceed $900, the amount required to be paid under the second lease, and it is clear that it was not the purpose of the transaction to give the lessor double rent for his property. In fact, since the second lease necessarily granted to the lessee the control and care of the property, it would seem logically to follow that the right to the rents, issues, and profits issuing therefrom passed by the operation of law to her. There can be no difference on principle between the situation here presented and one where the lessor, subsequent to the execution of the lease, conveys by deed the property to a third person. If in such a case there

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be no reservation of the rents to accrue under the lease, they pass to the grantee by operation of law. Gale v. Edwards, 52 Me. 363; Pelton v. Place, 71 Vt. 430, 46 Atl. 63; 24 Cyc. 926. Any other result would be at variance and in direct conflict with the grant, namely, the title, and the exclusive use and enjoyment of the property, and all benefits issuing therefrom.

The precise question has not often arisen, so far as appears from the reports, but we are not entirely without precedent. In Logan v. Green, 39 N. C. 370, the court held that when "there is an outstanding lease for a number of years, and the reversioner makes a new lease to third persons to commence immediately, this is a vested estate; and, although the second lessees could not take possession of their term, inasmuch as the possession belonged to the first lessee, they would have a concurrent lease, and be entitled to all the rents issuing out of the term of the first lessee." The facts in that case were similar to those in the case at bar. See, also, where the same rule is applied, Pendergast v. Young, 21 N. H. 234. This conclusion follows logically from the construction we give the lease, for no other result would be consistent with the legal effect of the transaction. We therefore hold that the second lessee is entitled, so long as her lease remains in force, to collect and receive the rent due under the first lease.

2. In view of this result, many of the assignments urged in support of the motion for a new trial become immaterial. We have examined them all, however, and find therein no error of a character to justify a new trial.

Order affirmed in each case.

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JAMES MEEHAN Jr. v. JOHN P. MEEHAN and Another.[1]

July 19, 1912.

Nos. 17,644—(163).

Abuse of discretion to deny new trial — preponderance of evidence against verdict.

Appeal from an order denying appellant's motion for judgment notwithstanding the verdict or for a new trial, in an action against the executors for the value of personal services rendered by respondent to their testator. *Held*, that the motion for judgment was correctly denied, but that it was error to deny the motion for a new trial because of error in the admission of evidence, and for the reason that the verdict was so manifestly against the preponderance of the evidence that it was an abuse of discretion not to submit the case to another jury.

From an order of the probate court for Red Lake county allowing James Meehan's claim for $10,450 against the estate of Patrick Meehan for services rendered, John P. Meehan and Michael Carpenter, as executors of the estate of Patrick Meehan, deceased, appealed to the district court for that county. The appeal was heard before Watts, J., and a jury which returned a verdict in favor of plaintiff for $8,200. From an order denying their motion for judgment notwithstanding the verdict or for a new trial, the executors appealed. Reversed and new trial granted.

Stanton & Rowberg, Charles E. Boughton and *John J. Maher,* for appellants.

Greeley E. Carr and *F. A. Grady,* for respondent.

START, C. J.

The respondent herein presented a claim against the estate of his uncle, Patrick Meehan, deceased, and the executors thereof appealed from an order of the probate court allowing the claim to the district court of the county of Red Lake.

[1] Reported in 137 N. W. 102.

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The complaint in the district court alleged that between January 1, 1900, and September, 1908, the plaintiff, at the request of Patrick Meehan, hereinafter referred to as the deceased, performed work and services for him which were of the reasonable value of $10,450. The answer denied the allegations of the complaint, except as therein admitted, and alleged a full accounting and settlement by the parties of all matters between them including the services alleged in the complaint, on September 1, 1908, and that there was found due to the deceased the sum of $2,600, no part of which had been paid, except $2,000, leaving a balance due to the deceased of $600, which was evidenced by the respondent's note to him for that amount. The answer demanded judgment in favor of the executors for $600 and interest. The reply put in issue the alleged settlement and accounting, but admitted the execution of the note, and alleged an agreement for the cancelation thereof upon certain alleged conditions, and that those conditions had been performed.

The issues were submitted to the jury, and a verdict returned for the respondent in the sum of $8,200. The executors appealed from an order denying their motion for judgment notwithstanding the verdict or for a new trial. Their assignments of error are to the effect that the trial court erred in denying their motion for a directed verdict in their favor and in denying their motion for judgment; that it erred in denying their motion for a new trial, because the verdict is not sustained by the evidence; and, further, that it erred in its rulings as to the admission of evidence and in its instructions to the jury.

The evidence is practically undisputed that from 1890 to 1900 the deceased and his brother James Meehan, the father of the respondent, as copartners, carried on an extensive logging and mill business at Thief River Falls, Minnesota, and that during the time stated the respondent was in the employ of the firm; that about January 1, 1900, the firm sold their business, but the firm notes and accounts were taken over by the deceased, and were left by him in the hands of the respondent, who continued to reside at Thief River Falls, to collect for the deceased; that he did collect and account for some $15,000; and, further, that the respondent continued to reside at Thief River Falls until 1903, and that from the years 1900 to 1907 he was largely

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interested in real estate transactions and business in that city on his own account. The evidence tends to show that during the time stated the respondent was requested to and did look after other business matters for the deceased, especially his real estate and his lawsuits. The making of such collections and attending to such other matters for the deceased were the basis of respondent's claim against the estate of his uncle.

The executors introduced on the trial documentary evidence which, to say the least, strongly supported their contention that all services rendered by the respondent to the deceased for which it was intended by either party that compensation should be made were fully settled and adjusted between them as alleged in the answer. It appears from the documentary evidence that in January, 1905, the respondent rendered a statement of account to the deceased, the first debit item of which was this:

"Jan. 1, 1904. To Bal. Statement Rend., $85.38."

And the last one was:

"Jan., 1905. 6 months' work May, June, July, Aug. Sept. Oct. $600."

Making the total debit $1,129, which, less $110 credit, left a balance due to the respondent of $1,019, which was paid, and he receipted for it January 7, 1905.

His letters to his uncle, which were received in evidence, show that he was indebted to him for borrowed money, during the time that the services for which he claims compensation were rendered, which he was anxious to pay, but was unable to do so.

On May 1, 1905, he wrote to his uncle as follows: "I enclose you a draft for $500. I will have the balance of what I owe you in a few days. I should have sent this sooner, but had to buy the two lots in Thief River. * * * "

On December 7, 1905, he wrote: "I will need about $2,000 to close up my building operations. * * * I enclose you a note for $2,000. If you have the money on hand, and want to let me have it, all right; if not, you can send the note back."

On May 13, 1906, he wrote: "I expected to have that money before now, but have been disappointed in making a sale that I thought sure

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was going through. I have, however, good prospects of having the money inside of two weeks, and will remit to you at once."

On July 27, 1906, he wrote: "I am sorry to keep you waiting for the money. I expect to sell the house I have just built here next week, and will send you part or all of it then. I haven't been making much money the past six months and have been unable to sell anything. I am getting in shape now, so you won't have to wait much longer."

On August 28, 1906, he wrote: "This debt to you has worried me continuously. If I had any luck in selling anything, as I expected when I borrowed it, I would have paid you when it was due."

On September 22, 1906, he wrote: "As you are interested to the extent of $2,000 in my financial welfare, I thought best to write you and explain I had just about completed the sale of nine quarters of father's land at $300 above the prices he put on the land. This would have made me a profit of $2,700. Father came * * * today and took the land out of the market. * * * I had everything in good shape to sell all the land at a profit of $600 to him. He is not satisfied, but places me in a position where I have to go asking for favors or go into bankruptcy. If I had your debt paid, I wouldn't care for anything else. * * * Whatever happens, you can rest assured you will get your money as soon as I can get it."

It is true, as counsel for respondent claims, that the account stated in January, 1905, does not contain any charge for services, except for the months therein specified. If, however, the respondent had rendered other services to his uncle during five years next before the statement was rendered, for which he expected to charge and which had not been adjusted, why were they not included in the statement? Again, if his uncle was owing him for services more than $10,000, as he now claims, why was he borrowing money from him? Why did he write the letters to which we have referred? Why did he wait until his uncle was dead before making the claim? The only possible answer to these questions is that suggested by his counsel in their brief: "He borrowed different sums of money from the deceased, and, believing that his uncle was going to provide for him substantially in his will, did not wish to antagonize him by asking for a settlement, or to have it applied upon the amount due him for services.

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In fact, every letter or act of the plaintiff shows that he expected to be paid for these services by a bequest in his uncle's will, and that as soon as the will was admitted to probate this plaintiff took the only and proper steps to protect his claim."

There was evidence tending to show that the deceased stated to a third party that he was going to do well and substantially by the respondent in his will, and that this was told to respondent, and, further, that deceased said in effect to another person that he would take care of the respondent when the time came; but this was stricken out, because it was never communicated to the plaintiff. Nevertheless the person to whom this statement was made was permitted, over the appellant's objection, to testify as to what he said to the respondent, in these words:

"You as a young man have got a good chance, I says; if you do not antagonize your uncle, he may do well for you in years to come; it would pay you to keep good friends with him."

This was simply gratuitous advice, there being no suggestion to the plaintiff as to what his uncle had said. It was error to admit the evidence, as it was incompetent and prejudicial. The evidence, however, as to what the deceased said with reference to providing in his will for the plaintiff, was correctly received in evidence, because it was communicated to the plaintiff, and was a circumstance of some significance, which the jury might properly consider in connection with the evidence as to the delay of the plaintiff in asserting his alleged claim.

While the evidence tending to show that the plaintiff kept silent as to his alleged claim, while his uncle was living, because he expected to be provided for in his will, is far from satisfactory, yet there is some evidence tending to support the verdict.

It follows that the trial court did not err in denying the appellant's motions for a directed verdict and for judgment notwithstanding the verdict. A consideration, however, of the entire record, leads us to the conclusion that the verdict is so manifestly against the great preponderance of the evidence that the trial court ought, for this reason and for error in receiving evidence, to have granted a new trial,

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and that its refusal to do so and to submit the case to another jury was an abuse of discretion.

We find no reversible errors in the rulings of the trial court on the admission of evidence as to the value of the plaintiff's services. The instructions to the jury assigned as error were substantially correct.

Order reversed, and new trial granted.

GAMBLE-ROBINSON COMMISSION COMPANY v. NORTHERN PACIFIC RAILWAY COMPANY.[1]

July 10, 1912.

Nos. 17,668—(198).

Waiver of notice — finding not sustained by evidence.

The bill of lading, under and pursuant to which certain apples were shipped over defendant's road, provided for a notice of any claim for injury or damage to the property to be served upon the company within four months. No such notice was served, and the trial court found as a fact that defendant waived the same. It is *held* that the evidence does not sustain the finding.

Same.

A waiver of such a notice cannot be predicated upon a mere denial of liability when the claim is presented.

Action in the municipal court of Minneapolis to recover $414.79 damages to a carload of apples, caused by negligent delay in shipment. The answer admitted that defendant received a carload of apples for transportation to Aitkin; alleged that the car was received from a connecting carrier, the Minneapolis & St. Louis Railway Company, and that defendant promptly and carefully transported the apples to their destination; denied that the apples while in defendant's possession and under its control became frozen or that they were in any way damaged. The case was tried before Charles L. Smith, J., who made findings and as conclusions of law ordered judgment in favor of plain-

[1] Reported in 137 N. W. 19.

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iff for $470.44. From the judgment entered pursuant to the findings, defendant appealed. Reversed and new trial granted.

C. W. Bunn and *D. F. Lyons,* for appellant.

H. R. Hewitt, for respondent.

BROWN, J.

Action to recover damages for injuries to a car of apples shipped over defendant's road from Minneapolis to Aitkin, this state, which plaintiff alleges were frozen in transit by reason of the negligent delay of defendant in forwarding the same. The action was tried below without a jury, and judgment awarded to plaintiff, from which defendant appealed.

It appears from the record and findings of the trial court that the apples were shipped under and pursuant to a contract as embodied in the bill of lading issued by defendant and delivered to plaintiff at the time. The bill of lading contained the following provision:

"Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed."

The apples were delivered to defendant on November 13, 1909, and arrived at Aitkin, the point of destination, on the sixteenth, and were then delivered to plaintiff. It is claimed that the apples were in good condition when delivered to defendant, but frozen when they reached Aitkin, and that the cause of the freezing was the negligent delay in the movement of the car. Yet no claim of the kind was presented to defendant, in writing or otherwise, until the lapse of seven and one-half months after the arrival of the apples at Aitkin. The trial court expressly found that plaintiff failed to comply with the conditions of the contract in this respect, but further found that defendant waived the same. The finding of a waiver is assigned as error, and whether the court erred in so finding presents the only question in the case.

The only notice plaintiff ever gave of its claim, so far as shown by the record, was in the form of a letter written by its attorneys

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to the defendant's claim agent on July 1, 1910. This letter made reference to the shipment of the apples, stated that they were damaged by freezing by reason of defendant's delay in the movement of the car, and requested a settlement of the claim. The letter was not replied to by the claim agent, and on July 21 the attorneys again wrote, calling attention to the former letter and the failure of the agent to reply, and again requested that the matter receive his attention. In response the claim agent wrote the attorneys on July 30, 1910, the following letter:

"In reply to your letter of 21st, I return papers submitted in support of your claim 5556 with advice that, if your clients have explained to you the conditions and facts as they really exist, you know there is no liability with this company, and we cannot entertain the claim."

The matter rested here until December 7, 1910, when the attorneys again wrote the claim agent, asking for an explanation of his letter of July 30, quoted above, to which the agent replied on December 9, the following:

"Replying to your letter of the 7th inst. your file 5556, would advise that we find there is no liability with this company."

This constitutes all the evidence bearing directly or indirectly upon the question of the waiver, and we hold it insufficient to support the findings of the court below.

In determining what acts or conduct on the part of a person entitled to notice of claim, under a contract stipulation like that here in question, will constitute a waiver of the notice, a distinction is to be observed between those cases where the alleged waiver occurred before the expiration of the time fixed by the contract for the service of the notice and those cases where the acts and conduct relied upon occurred after that date. Acts and conduct occurring at a time when the notice could properly be served, having a tendency to lead to the belief that formal notice will not be insisted upon, or which are inconsistent with an intention to rely upon a compliance with the contract in that respect, constitute a waiver which, on the theory of equitable estoppel, the party will not be permitted to repudiate. But where, as in the case at bar, the conduct relied upon as a waiver occurs after the expiration of the time limited for

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the notice, the situation is entirely different. The failure to give the required notice vests in the party entitled to it a complete defense to an action upon the asserted claim, and the conduct relied upon as a waiver of the defense should with reasonable certainty justify the conclusion that it was intentionally waived, or be so inconsistent with an intention to insist upon the defense that the conclusion of waiver would follow as a matter of law. A waiver might arise as a matter of implication, depending upon the facts in a particular case, where the party entitled to notice, subsequently to the time when it should have been given, voluntarily enters into negotiations for the settlement of the claim, makes an offer of compromise, or from other conduct clearly recognizing the existence of the claim on its merits.

The evidence in the case at bar presents no such case. The liability of the company was expressly repudiated in both the letters relied upon as showing a waiver, and the company declined to entertain the claim. There were no negotiations looking to a settlement, and the action of the claim agent amounted, at most, to a denial of liability on the part of his company. This assertion of nonliability was well founded in fact, for plaintiff had lost its right by failing to give the requisite notice. For aught that appears, that fact may have been the basis for the refusal of the agent to consider the claim. It seems clear that the waiver of a vested defense cannot be predicated upon conduct such as here presented, amounting to nothing more than a denial of liability. Parsons, Rich & Co. v. Lane, 97 Minn. 98, 106 N. W. 485, 7 An. Cas. 1144. The case of Banks v. Pennsylvania R. Co. 111 Minn. 48, 126 N. W. 410, is not in point. In that case it appeared that the claim, made long after the time fixed therefor by the contract, was taken up by the defendant, considered upon its merits, and rejected, on the ground that the facts did not show liability.

It follows that the court below erred in finding a waiver of the conditions of the contract requiring notice of the claim to be presented within four months, and there must be a new trial. The contention of plaintiff that the shipment was not in fact made under the terms of the bill of lading, but under an oral arrangement, is not covered by the findings, and is not, therefore, considered.

Judgment reversed, and new trial granted.

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JACOB DETWILER and Another v. J. W. DOWNES and Another.[1]

July 19, 1912.

Nos. 17,671—(195).

Sale — warranty — error to strike out evidence.

Where, in the sale of a sawmill with warranty that it should be of good material, well made, and capable of doing good work, the evidence tends to show that the contract of sale called for steel pinions, but cast iron pinions were furnished; that these pinions broke, and the sellers, when notified by the purchasers, promised to send steel pinions, but sent cast iron, renewing and breaking the promise repeatedly; that the breaking of these pinions caused frequent interruptions in the work of the mill and loss to the purchasers—it was error to strike out the evidence relating to the purchasers' claim for damages on the ground that the warranty in the contract of sale provided that the sole remedy for a breach was a return of the mill within a specified time.

Evidence of waiver.

Also *held* that, if the promises made subsequent to the delivery of the mill are not treated as giving the purchasers an independent cause of action in case of breach, such promises and attempted performances are evidence of waiver of the written notice stipulated in the contract of sale as a prerequisite to any claim for damages against the sellers.

Action in the district court for Dakota county to recover $492 upon a promissory note. The substance of the answer is stated in the opinion. The case was tried before Johnson, J., who directed a verdict in favor of plaintiff for $521. From an order denying defendants' motion for a new trial, they appealed. Reversed and new trial granted.

W. H. Gillitt, for appellants.

McDonald, Bernhagen & Patterson, for respondents.

Holt, J.

Action on a promissory note and open account, to which was in-

[1] Reported in 137 N. W. 422.

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terposed a counterclaim for special damages resulting from alleged breach of contract in the sale of a portable sawmill. At the close of the trial the court struck out all testimony relating to the counterclaim, and directed the jury to return a verdict for the conceded amount due on plaintiffs' demand. From the order denying a new trial, defendants appeal.

The answer alleged, as to matters here material, that plaintiffs sold defendants a portable sawmill in September, 1909, under a written warranty that the same was of good material, well made, and with proper management capable of doing as good work as similar articles of other manufacturers. It is alleged that plaintiffs did not furnish the machinery and appliances that were of good material and capable of doing good work; that the pinions were of cast iron, and not of steel, as specified in the contract; and that the frictions were of common pasteboard, and not of friction paper, and not capable of doing the work or standing the wear put upon them. It is also alleged that plaintiffs were notified that the mill did not comply with the contract and warranty in these respects, and that plaintiffs promised to remedy the defects, but, instead of so doing, kept on sending cast iron pinions, instead of steel, and the inferior friction paper; that the pinions, because not of steel, as promised, broke, and the friction paper wore out, causing delays, so that it took twenty-eight men and five teams fifty-two days to cut the lumber which defendants had to cut, when, had the mill been as contracted for or warranted, they would have done the work in thirty-four days, all to defendants' damage in the sum of $978.75.

The contract attached to the answer calls for steel pinions sixteen inches in diameter. There were on the sawmill four cogwheels, which defendants called pinions, two of which were smaller than the others. But the record is silent as to the difference in size, and there is nothing to indicate whether the large or the small were sixteen inches in diameter. The smaller ones never broke, but on the larger ones defendants claim the cogs broke frequently, necessitating replacement or repair, and shutting down of the mill every few days. The evidence is not contradicted that some twelve or fifteen pinions or cogwheels thus gave out during the winter. When the testimony

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was all in, the court, on motion of plaintiffs, struck out all evidence relating to the counterclaim, and instructed the jury to return a verdict for plaintiffs.

From the order denying a new trial, defendants appeal.

The contract of sale contained this warranty and condition:

"The above articles are warranted to be of good material, well made, and with proper management capable of doing as good work as similar articles of other manufacturers. If said machinery or any part thereof shall fail to fill this warranty within ten days of first use, written notice shall be given the Enterprise Mfg. Co., Columbiana, Ohio, and to the party through whom the machinery was purchased, stating wherein it fails to fill the warranty, and time, opportunity and friendly assistance given to reach the machine and remedy any defect. If the defective machinery cannot then be made to fill the warranty, it shall be returned by the undersigned to the place where received, and another furnished on the same terms of warranty, or money and notes to the amount represented by the defective machine shall be returned, and no further claim made on the Enterprise Mfg. Co. Continued possession or use of the machine after the expiration of the time named above shall be conclusive evidence that the warranty is fulfilled to the full satisfaction of the purchasers, who agree thereafter to make no further claim on the Enterprise Mfg. Co. under warranty. In case any castings fail through defect in its [sic] material during the first season, defective pieces shall be replaced without charge, except freight or express charges."

The learned trial court concluded that the provisions in the contract gave only one remedy for a breach, namely, a return of the mill, after trial for a specified time as therein stipulated, and that there was no waiver of written notice of failure of the mill to comply with warranty.

It is to be noticed that the warranty is twofold: (a) The mill is warranted to be of good materials and well made; and (b) with proper management capable of doing as good work as similar articles of other manufacturers. No complaint is made that the mill did not do good work. The breach of the warranty relates to the materials in two pinions and the friction paper.

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We may dismiss the alleged defective friction paper from consideration, for the reason that it does not appear that the court erred in striking out the counterclaim is so far as it rested thereon. Evidently the so-called friction paper is consumed or wears out in the operation of the mill. How long any set usually lasts on mills of the kind sold is not disclosed. The testimony that the friction paper was not of good material, or did not comply with the warranty, is, moreover, so vague and indefinite that it could not serve as a basis for a counterclaim.

With the pinions it is different. There is nothing to dispute defendants' claim that the larger pinions, which continually broke, were cast iron, as originally furnished and as replaced, although plaintiffs promised to supply what the contract called for, namely, steel pinions. Here was a clear breach of the contract as to the quality of the material. Defendants had bought the mill on the express agreement that the pinions should be steel. Is, now, the only remedy for a breach of the contract in this respect a return of the mill?

It may well be that, if defendants had received and used this mill for more than ten days with cast iron pinions, knowing them to be such, no action could thereafter be maintained for breach of the contract, in that they were not steel. But defendants at once, when they learned steel pinions had not been furnished, notified plaintiffs, who in turn, so the testimony runs, promised to furnish the ones called for by the contract. They undertook to fulfil the promise some twelve or fifteen times, but each time failed to give steel pinions. Plaintiffs are hardly in a position to insist that this is such a breach of the warranty that no action will lie, because written notice was not given and the mill returned within ten days after its first use. They knowingly continued to furnish pinions of material other than that specified in the contract, whenever defendants insisted that the defect be remedied. It is clearly not contemplated by the contract that the mill should be returned in case two wheels therein were of defective castings, or not of the quality required. Defective castings, because of the material therein, plaintiffs were to replace during the first season free of charge, so that such defects in material

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were not confined to those which appeared within the first ten days of the operation of the mill.

The contract here in question differs somewhat from the one before the court in Avery Planter Co. v. Peck, 86 Minn. 40, 89 N. W. 1123, and Larson v. Minneapolis Threshing Machine Co. 92 Minn. 62, 99 N. W. 623, in which the provisions of a return of the machine in case of breach of a warranty to do the work expected was considered. The contract here in question and the alleged breach relates more to the material of the machine. This is a matter that may not be disclosed by a short trial, and therefore, where permissible, a construction will be given to a warranty in respect to materials that is reasonable. McCormick Harvesting Machine Co. v. Fields, 90 Minn. 161, 95 N. W. 886. But, upon the facts disclosed herein, the correct view of defendants' counterclaim, if any they have, is that, after being furnished with a mill which had two pinions of cast iron instead of steel as contracted for, they were led to go on with the use of the mill by subsequent independent promises made time and again by plaintiffs to send the agreed article; that each time, till twelve or fifteen pinions were sent, plaintiffs broke their promises, and such breaches caused damage and loss to defendants for which a recovery may be had. This is true, whether it is held that the subsequent promises to send steel pinions modify the terms of the written contract, so that the ten-day trial limit cannot apply to the warranty as to material in these under the decision in McCormick Harvesting Machine Co. v. Fields, supra, or it is considered that these subsequent promises in themselves furnish a cause of action.

But, conceding that all these promises are referable to the contract of sale, so as to be governed by the conditions and warranties therein, we are not impressed with plaintiffs' contention that defendants are not in a position to insist that plaintiffs waived the condition in the contract which provides for the giving of written notice to defendants in case of failure of the mill to comply with the warranty. The claim is that waiver, to be available, must be pleaded. It seems to us that the answer alleges sufficient facts to show a waiver, even if that were necessary, in that it alleges that the pinions were cast iron, instead of steel; that plaintiffs were notified thereof, promised to

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send the steel, but sent cast iron pinions, and kept on making promises and attempts to fulfil them. Evidence went in without objection to substantiate these facts. That plaintiffs had all the notice any writing could give in regard to these pinions, and acted repeatedly thereon, is clear, if the defendants' evidence is believed by a jury.

In this case there is no allegation of general damages. But evidence in the nature of special damages was received without objection. It may not be free from doubt whether the record shows these damages to be such as were within the contemplation of the parties when the contract was entered into, or when the subsequent promises to furnish steel pinions, instead of the cast iron ones, were made. It is evident that the trial court did not reach a consideration of this matter, and there is no need of more now than calling attention thereto, so that at the trial due consideration will be given this phase of the case.

Order reversed, and a new trial granted.

SARAH J. MATHEWS v. GREAT NORTHERN RAILWAY COMPANY.[1]

July 19, 1912.

Nos. 17,675—(199).

Contributory negligence — evidence.

On the facts in this case, stated in the opinion, it is *held* that it does not conclusively appear that plaintiff was guilty of contributory negligence.

Action in the district court for Otter Tail county to recover $11,000 for personal injuries. The answer alleged negligence on the part of plaintiff. The case was tried before Taylor, J., who, when plaintiff rested, denied defendant's motion to dismiss the action, and a jury which returned a verdict in favor of plaintiff for

[1] Reported in 137 N. W. 176.

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$2,900. From the judgment entered pursuant to the verdict, defendant appealed. Affirmed.

J. D. Sullivan and *M. L. Countryman*, for appellant.

J. W. Mason, for respondent.

BUNN, J.

This is an action to recover for personal injuries. The trial resulted in a verdict for plaintiff, a motion by defendant for judgment notwithstanding the verdict was denied, judgment was entered on the verdict, and defendant appealed.

The facts over which there is little, if any, controversy, may be briefly stated as follows: Plaintiff, a widow of sixty-seven, was a passenger from Minneapolis to Fergus Falls on one of defendant's trains. The train arrived at Fergus Falls at four o'clock in the morning of September 12, 1910. Plaintiff went into the ladies' waiting room in the depot building. This room was at the time in darkness except for a kerosene lamp burning in the ticket office. Plaintiff had occasion to visit the toilet room, the general location of which in the room she remembered, from a visit to the waiting room about a year before in the daytime. She started to find the toilet room in the darkness, groping along the wall where she supposed it to be, and entered through a door that was partly open, but which led, not to the toilet room, but to the basement. She fell twelve feet upon a cement floor and sustained the injuries for which the action was brought.

The only question on this appeal is whether it conclusively appeared that plaintiff was guilty of contributory negligence. She knew there was a toilet room near where she was looking for it. It was pitch dark. She could see neither the sign on the door she wanted, nor anything to distinguish it from the cellar door. These facts distinguish this case from the case of Speck v. Northern Pacific Ry. Co. 108 Minn. 435, 122 N. W. 497, 24 L.R.A.(N.S.) 249, 17 An. Cas. 460. In that case it was daylight, and the plaintiff, had she looked, could have seen that she was not entering the door of the waiting room, which was plainly marked, and could have seen that the door she opened led to the basement.

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As said in the Speck case, it is impossible to formulate a universal rule. Each case, in a measure, must be determined by itself, in view of its own particular circumstances. The inquiry is, of course, whether plaintiff acted as a woman of ordinary prudence would have acted under similar circumstances. There is force in the argument that plaintiff had no right to take it for granted that there was no other door leading from the waiting room, and that, in view of the darkness, it was not due care to step through a doorway without some investigation to discover where it led to. But, on the other hand, it does not seem to us that reasonable minds could not well reach different conclusions as to whether she was in the exercise of ordinary care. Plaintiff had some right to presume that the premises were in a reasonably safe condition, and that no unguarded trap existed in the room. We cannot say as a matter of law that she was careless, either in groping in the dark for the door she wanted, or in supposing that she had found it. The question was one for the jury to determine. The case of Steger v. Immen, 157 Mich. 494, 122 N. W. 104, 24 L.R.A.(N.S.) 246, is different in its facts, and not in point.

Judgment affirmed.

FIRST NATIONAL BANK OF RUSH CITY v. RUSH CITY STARCH COMPANY and Others.[1]

July 19, 1912.

Nos. 17,678—(214).

Alteration of promissory note — evidence.

The evidence sustains the findings to the effect that there was no alteration of a promissory note after delivery to payee, so as to release the makers or guarantors.

Action in the district court for Chisago county to recover upon two promissory notes. The case was tried before Stolberg, J., who made

[1] Reported in 137 N. W. 179.

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findings as set forth in the opinion and as conclusion of law ordered judgment in favor of plaintiff for $3,190 and interest. From an order denying their motions for a new trial, defendants Anderson, Johnson and Hansen appealed. Affirmed.

S. G. L. Roberts and *Daniel Murphy,* for appellants.

Alfred P. Stolberg, for respondent.

HOLT, J.

The action, brought on two promissory notes, of $2,700 each, was tried to the court and judgment ordered in plaintiff's favor for the amount unpaid. The appeal is from the order denying the answering defendants' motion for a new trial.

The defendant Rush City Starch Company is a corporation, and during all the time since March 11, 1907, the other four defendants were directors or officers thereof. On the date mentioned the corporation executed and delivered to plaintiff its promissory note for $800; the other defendants having guaranteed its payment. It was alleged in the complaint, and the court found, that thereafter more money was needed by the Starch Company, and other notes given therefor, and in renewal of the one first mentioned. On April 23, 1908, two notes were executed for the benefit of the company, due October 23, 1908, each for $2,700. One of these purported on its face to be the note of the defendant corporation. The other purported to be the note of "John Anderson, Pr's.," and C. M. Johnson. All four defendants guaranteed payment of both notes. It would seem from the evidence that so large a loan could not be made direct to the Starch Company because of the Federal banking regulations, therefore one note was executed so as to appear to be the individual note of the president and secretary of the company. These notes were not paid, but were renewed when due, October 23, 1908.

These renewal notes are the ones in suit. The one was executed by the corporation, and payment guaranteed by the other defendants. Liability on this note is not denied. The other note for $2,700 the defendants John Anderson, C. N. Hansen, and J. P. Johnson claim they are not liable on. The defendant corporation and C. M. Johnson are in default. It appears that this note in dispute was signed

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by John Anderson and C. M. Johnson as makers, but through the signature C. M. Johnson three red ink lines are drawn. Then on the back thereof is imprinted with a rubber stamp the usual guaranty, waiver of notice, and consent to extensions. The blank therein for the insertion of "I" or "we" is not filled in, nor the date at the bottom, nor is there any signature on the line designated in the stamp as the proper place for a guarantor to sign; but a half inch below appear the signatures, one below the other in this order:

C. M. Johnson.
C. N. Hansen.
J. B. Johnson.

John Anderson answered separately, and alleged that he signed the note, believing it to be the sole note of the Starch Company, and that he, with the three other officers, were to incur liability only as guarantors. He further alleged that C. M. Johnson signed with him as joint maker; that after delivery the note was fraudulently altered by the name of C. M. Johnson, as maker, being canceled and indorsed as guarantor only. The defense of C. N. Hansen and J. B. Johnson is that after the making and delivery of the note "the said C. M. Johnson, one of the defendants herein, with the knowledge and consent of the plaintiff, and without the consent or knowledge of either of these defendants, materially altered said note, by striking off his signature as joint maker thereof with said John Anderson, and adding his signature thereto with said defendants J. P. Johnson and C. N. Hansen as one of the guarantors of said note."

John Anderson, who was president of the Starch Company, testified that he had signed so many notes that he did not remember very well the circumstances of signing the note in question. He, however, claimed that he understood he signed as president and as guarantor. When asked what influence was brought to bear on him by the officers or creditors of the Starch Company to induce him to sign, his answer was: "I remember it was an agreement between the directors to renew the note that was due then, and in that case we went in to sign. I signed, as I said before, as guarantor—go in equal with the rest of them when I signed the note." He further testified that there was no understanding that he and C. M. Johnson

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should be responsible primarily for payment, but that all four should be equally held. It also appears that in the note of which this is a renewal, while Anderson signed as maker thereof, he added "Pr's." to his signature. No such addition was made to the note in suit, nor did he sign as guarantor. It is plain, upon defendant Anderson's own version of the transaction, he can have no defense. He does not claim that, when he signed, C. M. Johnson's name appeared on the face of the note. He does not claim that any officer of plaintiff misled him in the least, or requested him to sign the note, either as individual or as an officer of the Starch Company.

The court found, after setting out the note in extenso, with the signatures thereto as hereinbefore indicated: "That the signatures to said note were appended thereto by the said defendants in order and manner hereinbefore set forth, and that the signature of C. M. Johnson on the face of the note was struck out as herein indicated before he signed the said note on the back. That said defendants, John Anderson, C. M. Johnson, C. N. Hansen, and J. P. Johnson, at the time of signing said note intended to and did make, execute, and deliver said note to plaintiff as their joint and several note, guaranteeing the payment of the indebtedness then due and owing by said Rush City Starch Company to plaintiff, and as a renewal of note" hereinbefore described.

The errors assigned by the defendants Johnson and Hansen relate to the sufficiency of the evidence to sustain the findings. If the evidence supports the findings quoted, these two defendants cannot prevail on this appeal; for it is clear that the findings made negative the defense that there was a material alteration of the note after delivery thereof to plaintiff. Mr. C. M. Johnson was called as a witness, and gave as a reason why his signature was stricken out as maker, and indorsed on the note instead, that, after he signed on the face of the note, it came to his mind that as an individual borrower from the bank his name as maker on this $2,700 note would exceed the limit of the amount the bank could lawfully loan to one person; that thereupon the lines were drawn through his signature under John Anderson's name, and he signed his name on the back of the note, neither Hansen nor J. P. Johnson having

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then signed. To the same effect was the testimony of the cashier of the plaintiff, except that it might be inferred that, although C. M. Johnson's signature was indorsed on the note before Hansen and J. P. Johnson indorsed theirs, the red ink lines were not drawn through C. M. Johnson's name as maker till after, but all was done prior to acceptance of the note. Of course, Hansen and J. P. Johnson testify that, when they indorsed their names, C. M. Johnson's name did not appear, except as maker; but neither could give any good reason why Anderson and C. M. Johnson should be primarily liable. J. P. Johnson states he was the first to indorse the note, yet his signature is below the other two. He claims the blank guaranty contract stamp was on there, yet his signature is not in the space there provided, but an inch and a half below.

We have carefully examined the record and come to the conclusion that the evidence amply sustains the findings of the court.

The order is affirmed.

JAMES EVANS v. DRAKE & STRATTON COMPANY.[1]

July 19, 1912.

Nos. 17,710—(204).

Questions for the jury.

Upon the evidence, plaintiff's alleged contributory negligence and assumption of risk were questions of fact, and not of law.

Safe employment — charge to jury refused.

Where the court in a personal injury action had given full and clear instructions on the defenses of contributory negligence and assumption of risk,

[1] Reported in 137 N. W. 189.

Note.—As to duty of employee engaged in repairing or cleaning track to look out for his own safety, see note in 6 L.R.A.(N.S.) 646.

As to servant's assumption of risk of dangers created by master's negligence, which might have been discovered by the exercise of ordinary care on the part of the servant, see note in 28 L.R.A.(N.S.) 1250.

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Held, that the following requested instruction, stating the master's duty in conjunction with the servant's assumption of the risks of the employment, was properly refused as inaccurate and misleading, to wit: "Defendant was under no obligation to furnish safe employment for plaintiff, or to do its work in a safe way, provided the dangers of doing the work in the way it was done were open, apparent, understood, and appreciated by plaintiff, or would have been by the exercise of common sense and observation on his part."

Action in the district court for St. Louis county to recover $2,000 for personal injuries. The substance of the pleadings will be found in the third and fourth paragraphs of the opinion. The case was tried before Hughes, J., and a jury which returned a verdict in favor of plaintiff for the amount demanded. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

Spencer & Marshall, for appellant.

Samuel A. Anderson and *Warner E. Whipple,* for respondent.

HOLT, J.

The defendant, engaged in stripping a mine near Hibbing, had plaintiff in its employ as foreman of a crew of about sixteen drillers and blasters. In doing the work, a trench called the "approach" was sunk, leading into the pit or ore body to be stripped or uncovered. In this trench two narrow gauge railway tracks, with connecting switches and cross-over tracks, were laid. A steam shovel on one of these tracks loaded the material into dump cars, and these were pulled out to the dump and returned by so-called dinky engines. The tracks were on quite a downgrade towards the pit. The trench where drillers and blasters were working on December 20, 1909, when plaintiff received the injury, was some twenty feet deep. Plaintiff and the men under him were at the time in this approach, drilling and blasting the bank of the trench next to the track upon which the engine with the empty dump cars returned to the steam shovel for loading, and some one hundred to one hundred fifty feet nearer the dump than the shovel was; that is, the steam shovel was working behind the men and nearer the pit of the mine.

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The work of the drillers and blasters at this time appears to have consisted in drilling holes into the breast of the bank, often to a depth of fifteen or sixteen feet. These holes, after being properly scooped out, filled with black powder, and tamped, were exploded, thereby loosening the ground so that the steam shovel could work to advantage. The bank where plaintiff and his men were working at the time of the injury was irregular, and from five to fourteen feet away from the nearest rail of the track mentioned. Jagged masses of material blasted out or loosened came very near the track, so that in the work, and especially when using unwieldy tools, such as measuring rods and long handled shovels, some being sixteen feet long, the men of necessity had to be upon and along the track. At about eleven o'clock in the forenoon of the day stated an engine attached to some empty cars came down toward the steam shovel and struck down plaintiff, who, with another man, was measuring the depth of some holes then being drilled for blasting.

Plaintiff claims he was ruptured and seriously injured. The complaint alleged that the nature of the work was such that men engaged in drilling and blasting necessarily and frequently were upon and about the tracks to defendant's knowledge; that it was necessary, in order that the men should be reasonably safe and reasonably protected, that trains, before coming to where the work was being done, should give adequate warning by bell and whistle, and should come to a stop till the men had opportunity to get out of danger; and that it was the custom and practice to give such signals and to so stop trains. It is also averred that there was a bend in the trench, so that a train coming down toward the pit could not be seen at the place where plaintiff was, when injured, until within one hundred fifty feet of him. It is then alleged that while plaintiff, absorbed in his work, but vigilant in the use of his senses to ascertain impending dangers, was on or near the track at the point mentioned, the defendant ran one of its trains carelessly and negligently down upon plaintiff at a high and reckless speed, without stopping at the customary place, without giving the usual signals, and without keeping a proper lookout to avoid injury to plaintiff and the men working there.

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Defendant pleaded contributory negligence and assumption of risk as a defense.

Plaintiff recovered, and defendant appeals from the order denying its alternative motion for judgment notwithstanding the verdict or a new trial.

The errors assigned in this court are: (1) That plaintiff was guilty of contributory negligence and assumed the risk, hence judgment should now be ordered in defendant's favor; and (2) if that be not true, the court erred in refusing to give a requested instruction to the jury, therefore a new trial should be awarded.

In considering the contention that plaintiff was, as a matter of law, guilty of contributory negligence, his conduct must be judged in the light of the situation. His work, its character and place, and the usual and customary way in which defendant's servants operated the trains, gave signals, and looked out for safety of the men working on or about the track, must all be taken into consideration. To some extent, at least, plaintiff had a right to assume that the train crew would use ordinary care to avoid injury to him, and also that they would continue to use the customary signals and precautions in operating the train. There was evidence to go to the jury that, as the trains came down towards the place where the drillers and blasters were working, they would stop before reaching them and wait till plaintiff, the foreman, signaled; also that the whistle would be blown when approaching, in addition to ringing the bell. It is clear that, if the jury believed such was the practice, it had an important bearing upon the question whether plaintiff was in the exercise of ordinary care when struck; for there was no claim that the train stopped, or that plaintiff or any one from his crew signaled it to move ahead. There was also testimony tending to prove that neither the whistle sounded nor the bell rang before the collision. True, evidence sharply contradicting the alleged practice of stopping trains before coming up to the blasting crew, and not moving till signaled by the plaintiff, was adduced, together with positive testimony that the whistle was blown and the bell was rung before the accident; but clearly the determination of the truth of these opposing contentions was for the jury.

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Defendant points to the case of Sours v. Great Northern Ry. Co. 81 Minn. 337, 85 N. W. 114; Id. 84 Minn. 230, 87 N. W. 766, and Id. 88 Minn. 504, 93 N. W. 517, as being on all fours with the case at bar. But we think a marked distinction exists. Sours had no work to do upon the tracks. He was merely carrying a lighted lantern across a number of tracks, which were in constant use by trains, for the purpose of handing it to a trainman on a train about to pass there. In passing over the tracks he could give his undivided attention to his own safety. Plaintiff in the instant case must work upon or close to the track, his attention of necessity absorbed in his own work and that of his large crew. The danger to the train crew from the work being done by the blasting crew is another element which may be considered in determining whether plaintiff could rely to some extent on the fact that the train would not approach until those in charge were advised that it could safely pass. Floan v. Chicago, Milwaukee & St. Paul Ry. Co. 101 Minn. 113, 111 N. W. 957, and Torkelson v. Minneapolis & St. Louis R. Co. 117 Minn. 73, 134 N. W. 307, are more applicable to the facts in the instant case than that of Sours v. Great Northern Ry. Co. supra.

If the trains stopped before attempting to pass the blasting crew, and remained standing until signaled to come on by plaintiff, it cannot well be contended that plaintiff assumed the risk of the trainmen coming down upon the men without stopping or without being signaled. The same with reference to the other acts of negligence. If a master is negligent to the knowledge of the servant, there is reason for the rule that the risk of injury from such negligence is assumed by remainng in the service; but it is different as to unanticipated acts of negligence. In our opinion, plaintiff's negligence and assumption of risk were questions of fact, and not of law, and were properly left to the jury.

Defendant assigns error on the refusal to give this instruction to the jury: "Defendant was under no obligation to furnish safe employment for plaintiff, or to do its work in a safe way, provided the dangers of doing the work in the way it was done were open, apparent, understood, and appreciated by plaintiff, or would have been by the exercise of common sense and observation on his part." In

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so far as the requested instruction embodies the rule of assumption of risk, it was fully and clearly conveyed in the court's charge and in an instruction given at defendant's request. And in so far as it attempts to define the master's obligations, it does not state the law accurately. Combining, as the instruction does, a statement of the master's duty with the servant's assumption of risk, the law with respect to both must be stated correctly, or else the impression left on the minds of the jury will be misleading. The obligation of the master is to exercise ordinary care to furnish reasonably safe employment and to do the work in a reasonably safe way. This duty rests on the master at all times. His violation of this obligation does not change or remove it; but a servant remaining in the service, with knowledge and appreciation of the danger to him from the master's violation of duty, is without remedy if injured therefrom.

Order affirmed.

McMULLIN LUMBER COMPANY v. VILLAGE OF PINE ISLAND.[1]

July 26, 1912.

Nos. 17,482—(61).

Claim against village or city — notice.

R. L. 1905, § 768, requiring notice to a city, village, or borough of a claim for damages for loss or injury by reason of any defect in a street, road, bridge, or other public place, or by reason of the negligence of its officers, agents, or servants, has no application to a claim of liability under section 4536, R. L. 1905, for loss sustained by one furnishing labor or material to a contractor with a municipal corporation by reason of the failure to take from the contractor the bond required by section 4535.

[1] Reported in 137 N. W. 192.

Note.—As to validity of requirement of notice of injury as a condition of municipal liability, see note in 36 L.R.A. (N.S.) 1136.

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Action in the district court for Hennepin county to recover $383.22 damages for alleged negligence of the officers of defendant corporation in failing to take a bond as provided by section 4535, R. L. 1905. The case was tried before Dickinson, J., who made findings and as conclusion of law ordered judgment in favor of plaintiff for the amount demanded. From the judgment entered pursuant to the findings, defendant appealed. Affirmed.

A. J. Rockne and *D. C. Sheldon,* for appellant.

Van Derlip & Lum, for respondent.

BUNN, J.

Defendant in June, 1909, entered into a contract with one Nason for the construction of a village hall and lockup, and Nason erected and constructed the same pursuant to the contract. Plaintiff sold Nason building material, which was used in the construction and was of the value of $923.57. Of this sum, $383.22 was not paid by Nason. This action was brought against the village to recover this unpaid balance as the loss sustained by plaintiff because of the alleged failure of defendant to demand and receive from Nason a bond conditioned as provided by R. L. 1905, § 4535. The complaint alleged the failure to demand or receive the bond, that Nason was insolvent, that plaintiff had made and filed a verified statement of its claim with defendant, as required by statute, and demanded payment thereof, and that said claim had been disallowed and payment refused. Defendant answered, admitting the contract with Nason and the construction thereunder of the village hall and lockup, and the allegations of the complaint as to the presentation of the claim to and its disallowance by the village, alleging that defendant took a bond from Nason, and denying the other allegations of the complaint.

When the case came on for trial, defendant did not appear, and the court, after hearing the evidence, made findings of fact and conclusions of law, and ordered judgment for plaintiff. The court found that Nason was insolvent and had no property within the state, and that defendant failed and neglected to take or procure the bond required. From the judgment entered on the decision, defendant appealed to this court.

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The only ground upon which defendant contends for a reversal of the judgment is that plaintiff failed to give the notice required by section 768, R. L. 1905. This section, which has often been before this court, provides that "every person who claims damages from any city, village, or borough, for loss or injury sustained by reason of any defect in a street, road, bridge, or other public place, *or by reason of the negligence of its officers, agents, or servants,* shall cause to be presented to its council or other governing body, within thirty days after the alleged loss or injury, a written notice stating the time, place, and circumstances thereof, and the amount of compensation or other relief demanded."

It is defendant's position on this appeal that this section applies to a claim under R. L. 1905, § 4536, for the loss sustained by one who furnishes labor and material to a contractor for a public work, by reason of the failure of the municipality to take the bond from the contractor required by R. L. 1905, § 4535. We are clear that this position is untenable.

The liability imposed by section 4536 is clearly not in the nature of a liability for injuries to the person or to property caused by negligence of the officers, agents, or servants of the city or village. Whether it is strictly ex contractu, or ex delicto, is unimportant. It would seem to be a liability created by statute, and in the nature of a contract obligation. In any case it is clear that section 768 has no application, and that it was not necessary to give the notice prescribed by that section before suit could be maintained. That section has never been construed as applicable to any claims except those for injuries to persons or property sustained in accidents caused by defects in streets, roads, or public places, or by the negligence of the officers, agents, or servants of the city or village.

The reason for the enactment of the statute is stated in Mitchell v. Village of Chisholm, 116 Minn. 323, 133 N. W. 804, to be that it is important that the city or village be informed within a reasonable time of the circumstances of an accident resulting in injury to a claimant, so that it may be able intelligently to investigate the merits of the claim before the employees in charge of the work leave its employment. No such reason can be logically urged in support of a

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holding that the statute applies to a case where there is no accident, and no injury resulting therefrom to the person or property of a claimant. We hold that it was not necessary to give the notice prescribed by section 768, and that the claim was one that was properly presented to the common council for allowance under section 738, R. L. 1905.

It should not be understood that we hold that the judgment could not be affirmed on other grounds suggested by respondent. We decide only the question argued by appellant.

Judgment affirmed.

LAWRENCE GAUGHAN v. CITY OF ST. PAUL.[1]

July 26, 1912.

Nos. 17,577—(186.)

City charter — notice of injury to servant — violation of master's duties. Section 690 of the charter of the city of St. Paul, which is substantially identical with R. L. 1905, § 768, requiring written notice of injuries caused by any defect in any bridge, street, etc., or by reason of any alleged negligence of any officer, agent, servant, or employee of the said city, to be given to the city council as a condition precedent to the right to sue therefor, does not require such notice as a condition precedent to the right of an employee of the said city to sue for injuries caused by the city's failure to provide such employee with a safe place in which to work, or by the city's violation of any of the absolute duties of a master to the servant.

Action in the district court for Ramsey county to recover $20,000 for personal injuries. The case was tried before Dickson, J., who sustained defendant's objection to the introduction of any testimony

[1] Reported in 137 N. W. 199.

Note.—As to applicability in case of injury to municipal employee, of rule requiring notice of defect or notice of injury as condition of municipal liability for personal injury on street or highway, see note in 28 L.R.A.(N.S.) 533.

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on the ground the complaint did not state a cause of action and granted defendant's motion to dismiss the case. From the order denying his motion for a new trial, plaintiff appealed. Reversed.

John J. Kirby and *J. C. Michael,* for appellant.

O. H. O'Neill, Kenneth G. Brill, and *Albin E. Bjorklund,* for respondent.

PHILIP E. BROWN, J.

Action to recover damages for personal injuries claimed to have been caused by the negligence of the defendant. It was alleged in the complaint, in substance, that on May 20, 1911, while the plaintiff was in the employment of the defendant as a laborer upon its streets for hire, and in charge of its general foreman, he was ordered by the said foreman into an unsafe place in which to work, namely, an earth bank maintained and used by the defendant to furnish material for use in the repair and construction of its streets, and while there, and when acting within the scope of his employment and in the line of his duty, was injured solely by the negligence of the defendant, wherefore damages in a stated sum were claimed. The complaint contained no allegation of the service upon the council of the defendant city of any notice or claim of injury, as required in certain cases by section 690 of the defendant's charter and by R. L. 1905, § 768.

The defendant answered, denying all claims of its negligence, and alleged the defenses of contributory negligence and assumption of risks. To this answer the plaintiff interposed a reply, which was in effect a general denial.

The cause was tried on these pleadings to a jury, and the plaintiff had a verdict, which, however, was subsequently set aside, because the damages awarded were excessive. The case was thereafter brought on for a retrial on the same pleadings, whereupon the court sustained an objection, interposed at the outset by the defendant, to the introduction of testimony, on the ground that the complaint did not state facts sufficient to constitute a cause of action, and also its motion to dismiss the action; the basis of the court's rulings being the failure of the plaintiff to serve or to plead the service of the written notice of

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injury above mentioned. The plaintiff excepted to these rulings. A case was subsequently settled, and a motion for a new trial was made and denied. This is an appeal from such order.

Several grounds for reversal are urged by the plaintiff, including the claim that he was not required, as condition precedent to the maintenance of his action, either to plead or to prove that within thirty days after his injury he served on the defendant's council the notice and claim required either by section 690 of the defendant's charter or section 768, R. L. 1905, which contention is the only one we deem it necessary to consider and determine on this appeal.

Chapter 248 of the Laws of 1897 was the original of section 768 of the Revised Laws of 1905, and the body of this chapter is identical with the provisions of section 690 of the charter of the City of St. Paul. In Winters v. City of Duluth, 82 Minn. 127, 84 N. W. 788, decided in January, 1901, it was held that the act, in so far as it required the statutory notice to be given in actions for injuries due to the negligence of the officers or employees of a municipality, which are in no manner connected with any of the enumerated utilities, places, or works of the municipality, was unconstitutional, because of the insufficiency of the title of the act, but that the other portions of the statute were valid. In other words, the court "held in effect that the clause therein, 'or by reason of the negligence of its officers, agents, or servants,' was not germane to the title of the act. Hence no effect was given to it prior to the Revision of 1905." The act referred to was included in this revision, however, as section 768, and hence the part theretofore held unconstitutional was cured (Mitchell v. Village of Chisholm, 116 Minn. 323, 133 N. W. 804), and since March 1, 1906, the time when the Revised Laws went into effect, the entire act has been in force.

While the phraseology of the act of 1897 and of the present statute differs somewhat, the meaning is substantially identical. In effect, then, since March 1, 1906, the provisions of the charter of St. Paul and the general laws stated have been identical. In Kelly v. City of Faribault, 95 Minn. 293, 104 N. W. 231, an action for personal injuries, decided in June, 1905, the facts were that the defendant's superintendent of waterworks, who was authorized by the de-

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fendant city to hire the plaintiff, and who had general charge of the works, employed him, and while the plaintiff was engaged in repairing one of the city streets he was placed by such superintendent at work in a trench which was defectively constructed and improperly braced, with the result that the loose earth fell upon the plaintiff and injured him—a case parallel in its facts with the instant case. It was there held, Mr. Justice Lovely writing the opinion, on what we regard as sound reasoning, that the chapter referred to did not apply to a case where an employee or servant seeks redress by action for injuries received because of the city's failure to provide him with a reasonably safe place in which to work, or to its failure to perform other absolute duties of the master. The reasoning upon which such determination was reached is clearly stated therein as follows:

"The provisions of this statute relate to a defective bridge, street, public works, or places therein enumerated; and we think it very clear, from the history of the law requiring notice to municipalities of injuries thereon, and its subsequent development, that it never was intended to apply to the relations between master and servants when the latter are injured by reason of failure of the former to provide a reasonably safe place for the servant to work, or as to any absolute duties which are enjoined by law upon the employer. The object of the notice, when required, is well understood to be to give the municipality an opportunity to investigate, and to protect against fictitious claims. The reason for the rule hardly applies in a case where its own servants are injured in such work by the negligence of the master, but specifically to cases where the public are interested in using within their rights the property of the city. With reference to such injuries, when they occur, the municipality would seldom have notice or opportunity to obtain the requisite information of the cause thereof, or the evidence of the city's negligence, to enable it to defend, after long delay. This would not apply to an injury of the kind happening in this case, for it must be presumed that, with reference to its own servants, and the violation of its duties to them, it has and ought to have the same notice as other persons occupying the relation of employer over the persons who are in direct relation with it. While a very strict and technical construction of the statute might

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bring the case within its letter, we are very clear it was not within its spirit, and, if it is desired that it should be, the relief must be obtained from the legislature."

This case was followed and approved in Pesek v. City of New Prague, 97 Minn. 171, 106 N. W. 305, decided in January, 1906, wherein, likewise, the relation of servant and master existed between the parties. Mr. Justice Brown, in the opinion, pointed out that the case of Winters v. City of Duluth, supra, in fact involved the relation of master and servant, but that an examination of the record disclosed that the question of serving written notice on the defendant city was neither discussed nor decided therein.

In Mitchell v. Village of Chisholm, supra, the act and statute referred to were again considered. This was an action to recover for personal injuries, but involved no relation of master and servant between the parties. The case did involve the construction and application of that part of the act of 1897 which had been held unconstitutional in Winters v. City of Duluth, supra, and it was held that the giving of the statutory notice was essential, when the gravamen of the action was an injury caused by the negligence of the city's officers, agents, or servants, though the injury did not occur in any of the places enumerated in the statute. The Kelly and Pesek cases were referred to, and held not to be controlling, and it is equally true that the instant case is not controlled by the Mitchell case, for, as we have already noted, that case involved no relation of master and servant between the parties. To the doctrine of that case we adhere, while at the same time following the rule announced in the Kelly and Pesek cases, which, we think, is in no wise inconsistent with the decision in the Mitchell case. The question here involved merely comes to this:

Does the holding of the Mitchell case, to the effect that the Revision of 1905 revived that portion of the act of 1897 which was held to be unconstitutional in Winters v. City of Duluth, supra, require in reason, or render advisable in the interest of justice, the overturning of the rule announced in the other cases referred to, in which the relationship of master and servant was considered? We are of the opinion that the question must be answered in the negative.

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The Supreme Court of Washington, in the case of Giuricevic v. City of Tacoma, 57 Wash. 329, 106 Pac. 908, 28 L.R.A.(N.S.) 533, and also in Wolpers v. City, 66 Wash. 633, 120 Pac. 113, states the same views as here expressed with reference to the Kelly case, and we think that the Wolpers case fully sustains the other conclusions here announced.

Order reversed.

BANNER GRAIN COMPANY v. GREAT NORTHERN RAILWAY COMPANY.[1]

July 26, 1912.

Nos. 17,578—(129).

Switching charges — carrier's duty to consignees.

Action to recover for the amount paid defendant for switching cars to plaintiff's elevator on the alleged ground that the exaction thereof was a discrimination. Upon the facts found the trial court ordered judgment for one dollar. *Held:*

1. A carrier is bound to treat all shippers with equality and without discrimination. It is also bound, unless there be custom or contract to the contrary, when it receives shipments in carload lots, to make delivery at the consignee's place of business when located on its industrial tracks, or to connecting carriers and switching roads when the consignee's business is located thereon. It is not, however, bound, at its own charge, to make such delivery beyond its own or leased tracks.

2. Findings of fact considered, and *held* that they sustain the conclusion of law that the plaintiff was entitled to judgment for one dollar only.

Action in the district court for Hennepin county to recover $837 switching charges collected from plaintiff. The substance of the complaint and answer will be found in the opinion. The case was tried before Holt, J., who made findings and as conclusion of law ordered judgment in favor of plaintiff for one dollar. From an order de-

[1] Reported in 137 N. W. 161.

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nying plaintiff's motion to amend the findings and conclusions of law and from an order denying its motion for a new trial, it appealed. Affirmed.

Collins & Eaton, for appellant.

Cobb, Wheelwright & Dille, for respondent.

START, C. J.

This action was begun in the district court of the county of Hennepin to recover $837 for switching charges collected by the defendant from the plaintiff. The complaint alleged that between February, 1906, and May, 1909, the plaintiff owned and operated a grain elevator, known as the Quaker elevator, located in the city of Minneapolis and on the tracks of the Chicago & Great Western Railway Company, hereafter referred to as the Great Western; that there were also located on such tracks four other similar elevators and industries, namely, those of the Archer-Daniels Linseed Company, Russell-Miller Milling Company, the Merchants Elevator Company, and a plant of the Republic Creosoting Company, which required and received similar service in switching cars as the plaintiff's elevator did; that such tracks were connected with the defendant's, the Great Northern, by a direct switch; that the defendant switched cars to such other elevators and industries without charge, but discriminated against the plaintiff and exacted and collected from it one dollar for each car switched to its elevator, in all eight hundred thirty-seven cars, for which it paid $837, and, further, that the plaintiff demanded of the defendant the same facilities as the other industries received, which were refused.

The answer denied that the defendant had discriminated against the plaintiff, and alleged that the plaintiff's elevator was not located on the defendant's tracks, nor upon the tracks of any other company over which defendant had the right to run its engines and cars to plaintiff's elevator, but on those of the Great Western; that the switching charges in question were collected by the defendant for the Great Western, with which it was a connecting line, and paid to it pursuant to its legally published tariff rate for such service, which was duly filed with the Interstate Commerce Commission; that by

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such tariff rate the charge for switching cars from connecting lines, when the origin or destination of the shipment was outside of the corporate limits of the station, was one dollar per car; and, further, that the shipment in each of the cars for which switching charges were made and paid originated outside such corporate limits.

The cause was tried by the court without a jury. The controlling facts were stipulated by the parties, and the trial court found the facts substantially as stipulated. It is impracticable here to state such facts in detail because of their volume. They were, however, to the effect that the allegations of the answer were true, and, further, that the defendant, by contracts entered into between it and the Great Western, acquired, for a valuable consideration paid by the defendant, the right to use the tracks of the Great Western connecting with its own and leading to the several elevators and industries named in the complaint, other than that of the plaintiff, which was located near but beyond the last, in order, of the other industries, for the purpose of switching cars thereto from its own lines; that by the terms of such contracts the defendant was also given the right to secure the use of the Great Western tracks to plaintiff's elevator by assuming the burden of paying compensation therefor; that the defendant did during the times stated in the complaint switch cars from its own line to such elevators and industries on the leased tracks without additional charge therefor; that the defendant had no contract or arrangement giving it the right to use any of the tracks of the Great Western at such terminals or to do switching thereon, or to have cars going over its line thereto or therefrom without switching charges, except as provided in the contracts referred to, nor did it deliver to or take from, or cause to be delivered to or taken from, any industry or any concern on such tracks any car or shipment without the collection of the tariff switching charges therefor, except as herein stated; that during the time stated the defendant collected from the plaintiff $837 for such switching charges, and paid the same to the Great Western, but as to one of the cars the switching charge, one dollar, was collected without right; and, further, that the plaintiff at various times demanded of the defendant that it provide the same facilities for switching cars to the Quaker elevator as to the

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other similar industries, but the request was ignored until May 18, 1909.

The trial court found as a conclusion of law that the plaintiff was entitled to recover only one dollar and costs, and ordered judgment accordingly. The plaintiff made a motion for amended findings of fact in several particulars, and, further, that the conclusion of law be amended so as to direct judgment for the plaintiff in the sum of $837 and costs. The motion was denied. The plaintiff then made a motion for a new trial, and appealed from an order denying it.

The plaintiff assigns as error the denial of its motion to amend the findings of fact, but the alleged error is not discussed or urged in the brief of counsel, and is deemed to have been waived. The real question on this appeal is whether the facts found support the trial court's conclusion of law, or, in other words, do they show as a matter of law a discrimination against the plaintiff.

The law applicable to this question is well settled. A carrier is bound to treat all shippers with equality and without discrimination as to shipping facilities on its own or leased lines. When a carrier receives shipments in carload lots, it is bound, unless there be custom or contract to the contrary, to make delivery at the consignee's place of business, when located on its industrial tracks, or to connecting carriers and switching roads, when the consignee's business is located upon the tracks of such other roads. It is not, however, bound at its own charge to make such delivery beyond its own or leased tracks.

Now, it appears from the facts found by the trial court that the plaintiff's elevator was not located on the tracks of the defendant or on any track leased by it, but upon that part of the tracks of another carrier in which the defendant had no rights whatever. It also appears that the switching charges in question were collected from the plaintiff for the Great Western, in accordance with its published tariff rates, and paid to it. The charge of one dollar for each car switched was not for the defendant's benefit. It made no charge for its services in switching the cars either to the industries on its leased tracks, or in switching them to industries not on such tracks. It simply collected from the plaintiff the necessary switching charges

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exacted by the Great Western, in accordance with its published tariff rates for switching the cars over the part of its tracks not leased. It is clear, then, that the defendant treated all shippers similarly situated with equality. The plaintiff's misfortune was that it was not on the leased tracks.

The facts show that there was no discrimination against the plaintiff, unless the defendant was bound to secure and pay for a lease of the tracks to the elevator of the plaintiff. Whether the plaintiff might have secured free switching of cars from defendant's line to its elevator by application to the proper commission we need not inquire, for the fact remains that the defendant could not before an adjustment of the matter by the commission furnish such free switching without either securing an extension of the leased tracks and paying therefor, or by paying the switching charges. We hold that it was not bound to do either, and that the court's findings of fact support its conclusion of law.

Order affirmed.

HOLT, J., having tried the case below, took no part.

MYRTA ETHEL WEBSTER v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY and Another.[1]

July 26, 1912.

Nos. 17,628—(205).

Master and servant — action against both — verdict against one.

In an action against the master and one of his employees for damages due to their alleged negligence, a verdict against the master alone must

[1] Reported in 137 N. W. 168.

Note.—As to effect of verdict for servant in action against master and servant for latter's negligence or misfeasance, see notes in 9 L.R.A.(N.S.) 880 and 30 L.R.A.(N.S.) 404.

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be treated as a finding in favor of the employee, although the verdict is silent as to him; but such finding does not vitiate the verdict as to the master, unless the sole negligence alleged in the complaint against the master is the negligent act or omission of his employee.

Complaint construed.

Complaint herein construed, and *held* that the negligence charged against the defendant company is not solely the acts and omissions of its codefendant and employee, and that the verdict herein is not impaired by a failure to find against the employee.

Verdict sustained by evidence.

Evidence considered, and *held* to justify the verdict for the plaintiff.

Action in the district court for Ramsey county by the administratrix of the estate of William H. Webster, deceased, to recover $5,000 for the death of her intestate. The case was tried before Hallam, J., and a jury which returned a verdict in favor of plaintiff for $5,000. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

George W. Peterson, for appellant.

Samuel A. Anderson and *A. F. Storey,* for respondent.

START, C. J.

On November 24, 1910, at about two o'clock in the morning, the plaintiff's intestate was struck and killed by an engine of the defendant company in its railroad yard in the city of Minneapolis. This action was brought in the district court of the county of Ramsey to recover damages sustained by his widow by reason of his death, on the ground that it was caused by the alleged negligence of the defendant. The complaint alleged that the defendant Frank McManus was an employee of the defendant as a locomotive engineer and in charge of the engine at the time it struck the deceased; that the defendants then and there, in the exercise of ordinary care, could have stopped the engine in time to have avoided striking the deceased, and negligently ran the engine up to and against him, and thereby killed him; that he was caught in such a manner as to place

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him directly in the path of the engine, and in such position that he could not escape therefrom; and, further, that the negligent acts and omissions of the defendants, as herein set forth, together with the fact that he was so caught, were the sole causes of the accident resulting in his death.

The answer, in which the defendants united, put in issue the alleged negligence of the defendants, and alleged that the death of the deceased was caused solely by his own negligence and risks which he knew and appreciated. The affirmative allegations of the answer were put in issue by the reply.

On the trial and at the close of all the evidence, the defendants moved the court to direct a verdict in favor of them and each of them. The request was refused, cause submitted to the jury, and a verdict returned for the plaintiff in the sum of $5,000 against the defendant railway company only. The company appealed from an order denying its alternative motion for judgment notwithstanding the verdict or a new trial.

The first contention of the appellant is that the verdict against the defendant railway company, and not against the engineer, is inconsistent and exonerates the company. In an action against the master and one of his employees for damages due to their alleged negligence, a verdict against the master alone must be treated as a finding in favor of the employee, although it is silent as to him; but such finding does not vitiate the verdict against the master, unless the sole negligence alleged in the complaint against the master is the negligent act or omission of his employee.

The question, then, is whether the complaint, liberally construed, charges the defendant company with any negligence, except the negligence charged against its employee, the engineer. If it does not, the verdict against the company cannot be maintained; for the gist of the charge against the company is the negligence of the employee. The complaint directly charges that both defendants negligently ran the engine upon the deceased, and the negligence of the company is not limited by any express allegations to that charged against the engineer; hence, the only question in this connection is whether the complaint, by necessary intendment of such allegations, shows

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that the negligence of the company is based solely upon the alleged negligence of the engineer. Upon a consideration of the allegations of the complaint, we are of the opinion, and so hold, that they were sufficient, as against the defendant company, to admit evidence of the negligence in the premises of any of its employees. This seems to have been the practical construction of the complaint on the trial by the parties; for not until after the verdict was returned and the trial ended was any question as to the sufficiency of the complaint raised.

We are not to be understood as suggesting that any issue not tendered by the complaint was litigated by consent. There was evidence on the trial tending to show negligence on the part of the fireman; and the trial court instructed the jury to the effect that if either the engineer, McManus, or his fireman were negligent that would constitute negligence on the part of the defendant company, but McManus himself was liable only for his own negligence. No objection was made to this instruction, which was necessarily based upon a construction of the complaint, until it was assigned as error in the motion for judgment or a new trial. It follows that the implied finding of the jury in favor of the engineer does not impair the verdict against the defendant company, and that the record presents no question of variance.

The next contention of the plaintiff is that the verdict is not justified by the evidence. The record discloses evidence, direct and circumstantial, tending to show that the deceased was, on the day he was killed, a conductor on the freight train of the defendant company; that he went to the yard-master's office, and, when returning therefrom and going with a lighted lantern in his hand toward the caboose of his train, he was struck by the engine and killed; that before he was struck he stopped and gave stop signals by swinging his lantern three or four times across the track; that the signals were given at a time and under circumstances to have enabled the engineer, if he had observed them, or his attention had been called to them by the fireman, to have stopped the engine before it reached the deceased; that the fireman, if he had been attentive to his duties, could have seen his signals and notified the engineer in time to have avoided

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the collision, that the deceased was found at a switch between the rails, and his right shoe was found between the east and main rail and the adjoining switch rail in a space from five to two and one-half inches, which was sufficient for a shoe to get in and become wedged; that his shoe was unlaced, and his foot was not in the shoe when it was crushed; that his lantern, keys, and hat were found at or near his body; and, further, that there was no reason for his giving the stop signals, unless he was in a position of danger and unable to extricate himself.

In making these statements, we have taken the most favorable view permissible of the evidence for the respondent, as we are required to do when considering the sufficiency of the evidence. There was no direct evidence that the deceased was caught between the rails, or that it was he who gave the signals; but the jury might reasonably infer such facts from the evidence. Whether he was so caught was one of the important questions in the case, perhaps the controlling one in determining whether he was guilty of contributory negligence. The appellant urges in this connection that the evidence leaves this question a mere matter of speculation, and that the admitted physical conditions show that it was improbable, if not impossible, that he was caught between the rails. We are of the opinion that the circumstantial evidence furnishes a reasonable basis for the inference by the jury that the deceased was caught between the rails at the switch. The condition of his shoe, which was an exhibit in the case, and other circumstances tend to show that his foot was caught between the rails, as respondent claims. Upon a consideration of the whole evidence, we are of the opinion, and so hold, that it is sufficient to sustain the verdict.

Order affirmed.

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INTERNATIONAL LUMBER COMPANY and Another v. AMERICAN SUBURBS COMPANY and Others.[1]

July 26, 1912.

Nos. 17,633—(206).

Street railway — findings sustained by evidence.

The findings of the trial court to the effect that plaintiffs would suffer a special injury, different in kind from that suffered by the general public, by the construction of defendants' line of railroad along and upon the public street and highway fronting their property *held* sustained by the evidence.

Street railway — acceptance of grant to construct line.

Where the local municipal authorities grant to a street railway corporation the right to construct and operate a line of railroad upon and along the public streets of the municipality, conditioned upon the filing by the company of a written acceptance of the grant within a specified time, a compliance with the condition as to acceptance is essential to the vesting of the grant; and the grant will lapse and cease if the condition be not complied with.

Findings sustained by the evidence.

The findings of the court in this case, that defendants failed to file the necessary acceptance, *held* sustained by the evidence.

Powers of corporation — enlargement by municipal board.

Corporations, whether public or private, are creatures of the state, deriving their power from statutes providing for their organization; and it is beyond the authority of a local municipal board or council to enlarge the same by attempting to confer upon the corporation powers not possessed by its charter or articles of incorporation.

Private corporation — construction of railway.

Power and authority to construct and operate a street railroad cannot be conferred by such local municipal board or council upon a private corporation organized for the purpose of dealing in real estate.

[1] Reported in 137 N. W. 395.

Note.—As to power of municipality, in absence of express legislative authority, to grant franchise for street railway, see note in 22 L.R.A.(N.S.) 925.

As to right of abutting owner to damages for special injuries where street railway is not considered an additional burden, see note in 25 L.R.A.(N.S.) 1265.

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Action to enjoin nuisance.

Abutting property owners suffering a special injury from obstructions or nuisances in the street fronting their property, distinct from that suffered by the general public, may maintain an action for an injunction restraining the nuisance.

Action by abutting owner.

If the nuisance be placed in the street by a corporation, the property owner so offended may challenge the authority of the corporation in the premises, and its right to exercise a street car franchise.

Action in the district court for Koochiching county by the International Lumber Company and the Koochiching Company to enjoin the American Suburbs Company and the American Tramways Company, and others, from in any manner interfering with the soil of plaintiffs' lands and particularly that on Fourth street, and the extension thereof, in International Falls, and from laying rails on the land and highway. The case was tried before Stanton, J., who, when plaintiffs rested, denied defendants' motion to dismiss the action, and at the conclusion of the trial made findings and ordered judgment in favor of plaintiffs. From the judgment entered pursuant to the findings and from an order denying their motion for a new trial, defendants appealed. Affirmed.

Richard & Coe and *W. V. Kane,* for appellants.

C. J. Rockwood, for respondents.

Brown, J.

Action to restrain and enjoin the construction of a line of street railroad upon and along one of the streets of International Falls, and upon a public highway leading from said street to the village of Ranier. Plaintiffs had judgment, and defendants appealed therefrom, and also from an order denying a new trial.

The complaint alleges that plaintiffs are the owners and in possession of certain described real property fronting upon the street and highway in question; that they have constructed a large sawmill thereon, and are about to set the same in operation; that they have expended, in the construction and equipment of the mill, a sum exceeding $75,000; and that the premises in question have been pre-

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pared solely for the operation of this plant. The complaint further alleges that the street in question furnishes the only means of access to the mill; and that the construction of the railroad track therein will substantially and greatly impair the usefulness of the mill and the operation thereof. It also alleges that the threatened acts of defendants are wrongful and unlawful; that they are without authority to enter upon the street or highway, for the purpose of constructing therein their railroad tracks; and the prayer is that they be restrained from so doing.

Defendants answered, alleging in justification of their asserted right to construct car tracks in the said street, certain ordinances and resolutions enacted and adopted by the municipalities having the control and authority of the street and highway, by which the right to lay the car tracks upon the same was granted. Plaintiffs, in reply, denied the validity of these enactments, and enlarged upon and made more specific the allegations of the complaint in reference to the alleged special injury to plaintiffs.

Upon the issues thus framed, the cause proceeded to trial, at the conclusion of which the court made full and complete findings of fact and conclusions of law, directing judgment for plaintiffs for the relief demanded in the complaint.

The principal contentions in support of the appeal are (1) that the complaint fails to state facts sufficient to constitute a cause of action; and (2) that the evidence wholly fails to show in plaintiffs a right to the relief demanded.

1. No objection to the complaint was made in the court below, and it is urged for the first time in this court. The pleading was not demurred to, nor objection made at the trial which called in question the sufficiency of its allegations. The rule controlling a situation of this kind is well settled by our decisions. An objection to the sufficiency of a pleading, made for the first time in this court, will be overruled if, by any fair construction or intendment, a cause of action or defense may be spelled out of the allegations. 2 Dunnell, Minn. Digest, § 7726.

The precise objection is that the complaint fails to allege facts showing any special injury or damage to plaintiffs, different in kind

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from that suffered by the public at large, invoking the general rule that a private action will not lie for an obstruction of a public street, however wrongful or unlawful, unless the complaining party shows some special injury, not common to the general public. It must be conceded that the complaint is not as complete in this respect as the facts disclosed by the record would have warranted, and a seasonable objection thereto would probably have been sustained. But in respect to this feature of the case the complaint is enlarged and the allegations thereof fortified by the allegations of the reply, and, construed together, we find the essential fact, namely, plaintiffs' special injury, sufficiently alleged. We do not stop to consider to what extent the allegations of the complaint may be aided and fortified in a reply; there being no departure from the cause of action pleaded in the complaint. John H. Bishop & Co. v. Travis, 51 Minn. 183, 53 N. W. 461; 2 Dunnell, Minn. Dig. § 7629. No objection was made to the reply in the case at bar; and the trial below proceeded on the theory that proper and sufficient allegations were contained in the pleadings. The objections now made must therefore be overruled.

2. Defendants' proposed line of railroad extends from within the city of International Falls to the village of Ranier, a distance of three or four miles, to be constructed upon a highway as it extends across section 35, in which, and abutting upon the highway, plaintiffs own certain lands. The trial court found that the construction of the road, not only upon the street of the city, but upon the highway across section 35, beyond the city limits, would specially and peculiarly affect plaintiffs in the enjoyment of their property, and of these findings defendants complain as not supported by the evidence.

It appears that the street in question has been graded and graveled in the center to a width of twelve feet; that from this graveled way the street slopes to the gutters on each side, and, because of the nature of the soil, the street is, in times of wet weather, impassable for loaded teams outside the graveled way. It further appears that plaintiffs, to reach the market with their products, will be required to make almost constant use of the street with heavily loaded vehicles. Defendants propose to take exclusive possession of the graveled way, leaving plaintiffs to drive over and across their tracks, or upon the

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sloping sides of the street. The trial court found, in this connection, as follows:

"It will not be practicable to haul such loads along or across the defendants' tracks in the condition in which the defendants intend to maintain them; and the existence of the defendants' tracks in [said street] * * * will cause a great and actual damage to the plaintiff's mill and property, and will cause plaintiff, International Lumber Company, a great and actual injury and damage in the operation of its sawmill and the conduct of its business connected therewith."

The court also found, with reference to the construction of the railroad upon the highway over section 35, as follows:

"The defendants, prior to the commencement of this action, began grading for its tracks across section 35, between the graded roadway and the ditch on the south side thereof above described, and intend to place a railroad track upon said grade, constructed of ordinary ties about eight feet in length, and place T rails thereon about three and one-half inches high, and ballast with gravel between and under the ties, in the usual and ordinary manner of railroad construction. When completed, the earth embankments between the ties will be at some points a foot or so below the center of the graded highway; at other points a foot or so higher than the center of the graded highway. The defendants have placed at a number of points shallow drainage across their grading leading to the ditch; but the relative levels of the public highway and of the defendants' embankment and the manner of construction are such that the drainage of the public road will be seriously impaired and the road seriously damaged, and the plaintiffs' access to its lands seriously interfered with and obstructed."

Aside from the point urged by counsel for plaintiffs, that the construction of the railroad upon the highway would constitute an additional servitude, entitling plaintiffs to an injunction until their compensation is ascertained and paid, we hold that a special injury is sufficiently shown by the findings to entitle them to the relief granted, and we have only to determine whether the findings are sustained by the evidence. The suggestion of counsel for defendants

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that the findings are mere conclusions of law, and not matters of fact, is without force. The findings, though expressed in the abstract, are nevertheless conclusions of fact and not of law.

We have examined the record with care, and find therein sufficient competent evidence tending reasonably to the conclusion that the acts of defendants, of which complaint is made, will, if consummated, specially affect plaintiffs in their rights of property and access thereto in a manner different from the injury to the general public, and therefore sustain the findings. A discussion of the evidence would serve no useful purpose. The substance thereof is expressed in the findings.

The case is brought within the rule laid down in Aldrich v. Wetmore, 52 Minn. 164, 53 N. W. 1072. It appeared in that case that plaintiff owned and operated a barber shop on the ground floor of his building, fronting on a public street in the city of Minneapolis. The defendant owned the adjoining lot, and in the improvement of his property took up the sidewalk in front of it, and excavated a cellar on his lot and under the sidewalk, throwing the earth and material into the street in front of both his lot and plaintiff's shop, thereby obstructing travel upon the sidewalk and impairing access to plaintiff's property. The action was for damages resulting from the nuisance, and the court held that it could be maintained; that it was not necessary to the maintenance of a private action for obstructing a public street that all access to plaintiff's property be cut off; and that it is sufficient, in such a case, that the use of adjacent property is substantially and materially impaired. The rule there laid down has been followed and applied in subsequent cases. Fitzer v. St. Paul City Ry. Co. 105 Minn. 221, 117 N. W. 434, 18 L.R.A. (N.S.) 268, 127 Am. St. 557; Hruska v. Minneapolis & St. L. R. Co. 107 Minn. 98, 119 N. W. 491. See also Birmingham v. Moran, 151 Ala. 187, 44 South. 152, 125 Am. St. 21; Long v. Wilson, 119 Iowa, 267, 93 N. W. 282, 60 L.R.A. 720, 97 Am. St. 315; State v. Godwin, 145 N. C. 461, 59 S. E. 132, 122 Am. St. 467; Smith v. Mitchell, 21 Wash. 536, 58 Pac. 667, 75 Am. St. 858; Cushing-Wetmore v. Gray, 152 Cal. 118, 92 Pac. 70, 125 Am. St. 47; 11 An. Cas. 287, note; Schuster v. Milwaukee, 142 Wis. 578, 126 N. W. 26. The

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facts presented in Guilford v. Minneapolis & St. L. R. Co. 94 Minn. 108, 102 N. W. 365, and in other cases cited by defendants are essentially different from those here presented, and they are not in point. Plaintiffs' injury is of a special and peculiar nature, distinct from that suffered by the public at large—a fact not appearing in those cases.

The mere fact, however, that plaintiffs are specially damaged is not alone sufficient to sustain their right to an injunction. It must further appear that defendants are without authority to lay their railroad in the street and highway in question. If defendants have been legally and properly vested with this authority, then plaintiffs are not entitled to an injunction, though they might have an action for damages. We come, then, to that question.

3. Defendant American Tramways Company is a street railway corporation, organized and existing under the laws of the state of South Dakota. Defendant American Suburbs Company is a corporation, organized under the laws of this state for the purpose of dealing in real estate. The authority relied upon as vesting in the Tramways Company the right to lay its car tracks upon the street in question, within the corporate limits of the city of International Falls, is founded in an ordinance of the village council, predecessor of the city, by which the right was granted to that company, upon the terms and conditions therein prescribed. The line of road to be constructed by that company connects with the line to be constructed by the Suburbs Company at a point within the city; and the authority of the Suburbs Company is based upon an ordinance of the village and certain resolutions of the board of supervisors of the town through which the road extends, and the board of county commissioners. The Tramways Company claims no rights beyond the boundaries of the municipality, and the Suburbs Company claims no rights within the same, save to a limited extent, namely, from the station building of the Minnesota & International Railroad Company, as the same is located adjacent to the street in question. We dispose of the question of the rights of the companies separately.

4. The ordinance of the village council, granting the right to the Tramways Company to occupy this street and other streets of the

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village, expressly granted the right upon certain specified conditions, one of which was that the company should, within sixty days after the passage of the ordinance, file with the village recorder an acceptance thereof, signed by the president and secretary of the company; and that the grant should not become operative, or vest in the company any rights or privileges whatsoever, unless so accepted. The trial court found that the grant was not accepted by the company; and, therefore that it never took effect. If this finding is sustained, it is necessarily fatal to the asserted grant now insisted upon by defendants. The ordinance imposed numerous conditions upon the company, and reserved in the village council certain rights of control in the matter of the operation of the road when constructed, an assent to which by the company was essential to the creation of the privilege and franchise thereby intended to be granted. In other words, the ordinance amounted to nothing more than a proposal, and no vested rights were granted the company until acceptance, until the contract was completed in the manner by the ordinance provided, until which time it remained without force or effect, except as an offer to grant the use of the streets of the village, provided the company consented in writing to the conditions imposed. That formal acceptance or waiver thereof was necessary to the consummation of the transaction is clear under the authorities. Joyce, Franchises, § 348.

Counsel for defendants insist, however, that a proper acceptance of the ordinance was duly signed and filed as thereby required; and that the trial court erred in finding to the contrary. If it be conceded that the question whether the findings of the court are sustained by the evidence on this subject is before the court by proper assignment of error, we have only to add that an examination of the record does not bring to light evidence of a character to justify the conclusion that the findings are clearly and palpably against the evidence. The evidence fairly shows that an acceptance was prepared and signed soon after the passage of the ordinance; but it does not show that the document found permanent lodgment in the city clerk's office until some time in July, 1910, over a year after the ordinance was passed, and a few days prior to the trial of the action. The

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city recorder testified that a paper, which, at the time of the trial, he thought was an acceptance of the ordinance, was handed to him for filing soon after the ordinance was passed, and which he subsequently returned to the secretary of the Tramways Company; but he was unable to say that the document on file at the time of the trial was the same paper. He could not identify it as the same; and, so far as the record before us shows, the paper on file in July bears no marks, by indorsement or otherwise, that it had previously been on file in the recorder's office. The evidence is too uncertain to justify us in overturning the findings upon this question, and we sustain them. It follows that, since the Tramways Company failed to accept the ordinance within the time fixed therefor, the ordinance lapsed, became inoperative, and the Tramways Company can predicate no rights thereunder. In view of this conclusion, we pass, without consideration, several other objections to the validity of the ordinance, the determination of which is unnecessary to a decision of the case.

The point made in defendants' brief, that the acceptance was waived by the subsequent acquiescence of the public authorities, is not presented by the record, and is not considered. The court made no findings upon the question; nor was there any request for additional findings covering the point. The question is not, therefore, before us upon this record.

5. The Suburbs Company was organized as a real estate corporation. Its articles of incorporation recite that "the general nature of its business shall be buying, selling, owning, leasing, erecting, constructing, repairing, and maintaining of buildings of all kinds and character as owner, agent, or otherwise; the buying, selling, leasing, owning, and controlling of mortgages and other securities * * * the organizing and operating of such enterprises as may be necessary in the development of said properties and the doing of all acts incidental thereto; * * * and furthermore to transact all other lawful business."

The contention of plaintiffs is that, since the Suburbs Company was and is a purely private corporation, organized and created for a specific private purpose, it could not lawfully be clothed with a

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public franchise of the nature of that here involved; and that the ordinance of the village and the resolutions of the town and county boards were wholly ineffectual. We sustain this contention.

It may be conceded, for the purposes of the case, that a franchise to construct and operate a street railroad, granted by a municipal corporation, is not necessarily a corporate franchise, and that it may lawfully be granted to either an individual or a corporation. It is not essential to the existence of a corporation, but is a power conferred subsequent to its creation. Joyce, Franchises, § 30. Although our statutes provide that the right to construct street railways upon the public streets or highways may be granted by local authorities, including the town and county boards, to persons or corporations (sections 434, subd. 11, and 745, R. L. 1905), it is clear that, when granted to a corporation, the corporation must of necessity be one capable of its acceptance, and one which it may exercise under its charter powers. It is elementary that corporations can exercise no power or authority except such as is expressly conferred upon them by law or by their articles of association, and such as are incidental to the exercise of the powers expressly granted. When a corporation exceeds these limits, its acts are wholly ultra vires, and subjects its charter to forfeiture at the suit of the state. Suburbs Company had no authority, under its articles of incorporation, to enter upon the business of operating railroads; and it is obvious that local municipal councils and boards could not lawfully confer that power upon it.

The creation of corporations rests with the state, and the authority conferred by statute upon municipalities to grant to street railroad corporations the right to use the public streets must be confined to corporations authorized to engage in such an enterprise. The authority of the Suburbs Company cannot be enlarged by intendment, and the general clause of its articles of association, authorizing the transaction of any lawful business, must be limited to such matters and transactions as have some relation to the general business of the company. The powers of the company could not be enlarged by the local authorities. Nellis, Street Railways, § 10; Oregon Ry. & Nav. Co. v. Oregonian Ry. Co. 130 U. S. 1, 9 Sup. Ct. 409, 32 L.

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ed. 837; Farrell v. Winchester, 61 Conn. 127, 23 Atl. 757. If the franchise may lawfully be granted to a private real estate corporation, it might, with equal propriety, be granted to a life or fire insurance company, or to a religious or banking corporation. Clearly the legislature never so intended. It follows that, since the legislature has not authorized the grant of such power to the private corporation, organized for a specific private purpose, the attempt of the local authorities to vest the Suburbs Company with the power was a nullity. We so hold.

This covers all that is necessary to a decision of the case. We have considered all the assignments, and discover no sufficient reason for reversing the order denying a new trial.

Judgment affirmed.

JACOB BERGHUIS v. WILLIAM F. SCHULTZ.[1]

July 26, 1912.

Nos. 17,638—(183).

Restraint of trade.

Covenants of a contract for the sale of a mercantile business *held* not invalid as in restraint of trade, or as tending to create a monopoly.

Liquidated damages.

Provision of such contract for the payment of a certain sum by the seller in the event of his violation of the terms of the contract *held* to be a stipulation for liquidated damages, and not for a penalty.

Breach of landlord's contract — measure of damages.

Where a landlord, in releasing for a valid consideration his tenant from his obligations for the remainder of the term of a lease of a store building, knew that the tenant, in a prior sale of his stock of goods to a third person, had agreed, under condition to pay a certain sum in the event of his default, not to sublet the building for a general merchandise store during the remainder of his term, and it was covenanted in such agreement of release that the landlord would not let the said store for such purpose during the remainder of the time that the tenant's term would have run, the landlord's violation of such covenant rendered him liable, under the rule of

[1] Reported in 137 N. W. 201.

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Hadley v. Baxendale, 9 Ex. 341, to the tenant for the amount which the latter, by reason of such violation, was compelled to pay to such third person pursuant to the provisions of the contract for the sale of the goods.

Error to grant judgment notwithstanding verdict.

Evidence in such action *held* such that it was error for the trial court to grant the defendant's motion for judgment notwithstanding the verdict.

Action in the district court for Waseca county to recover $200 for breach of contract and $200 for loss of time and money expended. The substance of the answer will be found in the opinion, on page 90. The case was tried before Childress, J., and a jury which returned a verdict in favor of plaintiff for $200. From an order granting defendant's motion for judgment notwithstanding the verdict and denying his motion for a new trial, plaintiff appealed. Reversed with directions.

Fred W. Senn and *Henry M. Gallagher,* for appellant.

Moonan & Moonan, for respondent.

PHILIP E. BROWN, J.

Action to recover damages in the sum of two hundred dollars for breach of contract. The cause was tried to a jury. The court denied the defendant's motion, made at the close of the testimony, to direct a verdict in his favor. The plaintiff had a verdict for $200. Thereafter the defendant moved, on a settled case and the files and records in the action, for judgment notwithstanding the verdict, and in case of a denial thereof then for a new trial. The court granted the motion for judgment, and this is an appeal by the plaintiff from the order.

It appears from the record that the jury might have duly found from the proofs, under the issues, facts as follows: On August 6, 1909, the defendant, being the owner of a store building on lot No. 17, block 4, in the village of Pemberton, leased the same in writing to the plaintiff for the term of two years from August 1, 1909, reserving as rent therefor the sum of $240 a year, payable monthly in advance, which rent the plaintiff therein agreed to pay.

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On August 6, 1909, the plaintiff went into possession of the building under the lease and conducted a retail mercantile business therein until July 9, 1910, at which time he sold his stock of merchandise to one M. E. Williamson, who theretofore had conducted a drug store in the same village, and who, shortly thereafter, removed the said stock so purchased to his own place of business. The contract of sale just referred to was in writing, was executed July 9, 1910, and the here material parts thereof are as follows:

"This agreement, made and entered into this 9th day of July, A. D. 1910, by and between Jacob Berghuis, party of the first part, and M. E. Williamson, party of the second part:

"Witnesseth, that the said party of the first part, in consideration of the covenants and agreements of said party of the second part hereinafter contained, hereby covenants with the said party of the second part that the said party of the first part will sell his stock of general merchandise contained in the building on lot No. 17, block 4, in the village of Pemberton, Minn., at invoice prices, and also fixtures. Said first party also agrees that he will guarantee that the said building on lot No. 17, block 4, shall not be rented or let to any other party for the purpose of carrying on the business of general merchandise for the term of one year from August 1, 1910. He also agrees to give bill of sale of the property above specified.

"And the said party of the second part, in consideration of the said covenants on the part of the said party of the first part hereinbefore contained, hereby agrees to and with the said party of the first part that the said party of the second part will buy the said stock of general merchandise above specified, and pay for the same, after invoicing it, in cash.

"Either party to this contract agrees with the other that he shall forfeit the sum of $200 to the other party in case he shall fail to fulfil his part of this contract. Said sum shall be deposited by each party to this contract with the Pemberton State Bank."

At the time of the making of this contract the plaintiff deposited with the Pemberton State Bank $200 for the purpose referred to

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therein. On July 21, 1910, the parties to this action executed a written contract wherein the defendant, Schultz, covenanted, in consideration of the covenants and agreements of the said Berghuis therein contained, to fully release him from all of the obligations for the remainder of the term under the said lease of the building above referred to, and agreed with the said Berghuis therein that he (Schultz) would not "let" the said store building for the purpose of carrying on the business of general merchandise for the term of one year from August 1, 1910. Berghuis agreed therein to pay to Schultz $75 and to give other consideration for his said covenants. The plaintiff, after the execution of this contract, duly performed the conditions and agreements thereof by him to be performed, and vacated the building. Thereafter, and in September, 1910, the defendant, in violation of his contract, and with knowledge of the plaintiff's contract with Williamson referred to, rented his building to a firm known as Greiner & Co., who thereafter conducted a general merchandise business therein in October, 1910, and subsequently. On November 5, 1910, the Pemberton State Bank, by its cashier, paid to the said Williamson the sum of $200, being the amount which had been deposited with it by the plaintiff under the contract of date July 9, 1910. The plaintiff seeks to recover this sum in this action.

The complaint set out, as grounds entitling the plaintiff to relief, the facts above stated. The answer, so far as is here material, denied that the plaintiff had been damaged in any sum by any act of the defendant, further denied that the defendant had leased his building to Greiner & Co., and alleged by way of defense that the contract of date July 9, 1910, was made for the purpose of creating a monopoly in Williamson of the business of general merchandise in the village of Pemberton, and was therefore void, and also that the defendant's signature to the contract of date July 21, 1910, was obtained by fraud, and that such contract was also void.

Much consideration seems to have been given to the defense of monopoly and restraint of trade on the trial below, and the court charged at length thereon. It appears, however, from the memorandum of the trial judge, attached to the order appealed from, that

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the sole ground upon which he ordered judgment in the defendant's favor notwithstanding the verdict was that the evidence was not sufficient to establish a letting or renting of the building by him to Greiner & Co. subsequently to the making of the contract of date July 21, 1910, between the plaintiff and the defendant. The court asserts in the memorandum that "there was no evidence in the case from which the jury could say that the building had been rented or let."

1. Logically the first question requiring consideration is the defendant's claim, set up in the answer, that that part of the contract between the plaintiff and Williamson, wherein the plaintiff undertook that the defendant's store building would not be rented or let for the purpose of carrying on a general merchandise business for one year from August 1, 1910, was void as being in restraint of trade, and as being executed for the purpose of creating a monopoly of the said business in the village of Pemberton. And while this question has not been discussed by either of the parties to this action to any extent, it is of prime importance in the determination of this case; for if the position taken by the defendant, in his answer and in the court below in this regard, is correct, then the plaintiff could in no event recover in the action, and the order appealed from should be affirmed.

The defendant's contention cannot, however, be sustained. In addition to the facts above set out, it appeared that Pemberton was a village of about fifty inhabitants and that at the time of the making of the contract between the plaintiff and Williamson there were two mercantile establishments doing business therein; and in view of the nature of the business, the smallness of the village, the fact that the number of stores of the kind involved was not reduced by the transaction, and the short time that the contract was to run, we hold, as a matter of law, that the contract was not void, either as creating a monopoly or as being in restraint of trade, though the covenant complained of was concededly made for the purpose of preventing the establishment of another store in the village. Indeed, if the jury had found otherwise on this question, their verdict could not have been sustained. National Benefit Co. v. Union Hospital Co. 45

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Minn. 272, 47 N. W. 806, 11 L.R.A. 437; Kronschnabel-Smith Co. v. Kronschnabel, 87 Minn. 230, 91 N. W. 892; State v. Duluth Board of Trade, 107 Minn. 506, 524, 121 N. W. 395, 23 L.R.A. (N.S.) 1260.

2. The defendant contends that the provision for the payment of the sum of $200 in case of default under the contract between the plaintiff and Williamson, of date July 9, 1910, is void as being in effect a provision for a penalty, and therefore unenforceable, and further, that as the plaintiff, under no circumstances, can show that he suffered actual damages by reason of the defendant's renting of the building subsequently to his contract to refrain from so doing, and further, that as this court will in no event reverse an order simply to enable a party to recover merely nominal damages in an action on contract involving only monetary considerations (Kramer v. Perkins, 102 Minn. 455, 113 N. W. 1062, 15 L.R.A.(N.S.) 1141; Goulding v. Ferrell, 106 Minn. 44, 117 N. W. 1046), in no event should the order appealed from be disturbed. It may be conceded, for the present purposes, that all of the defendant's contentions in this regard are correct, save only the claim that the contract referred to stipulates for a penalty; but to the latter contention we cannot accede. Few principles of law, if any, are more difficult of application than those pertaining to penalties or liquidated damages.

The defendant analyzes the contract in question and claims that therein the plaintiff agrees (1) to sell his stock of merchandise, (2) that the building would not be rented for the purpose of carrying on a general merchandise business therein for one year, and (3) to give a bill of sale; and that Williamson agreed therein (1) to buy the plaintiff's stock at its invoice price, (2) to invoice the stock, and (3) to pay for same in cash. He further insists that this branch of the case comes within the rule announced in Carter v. Strom, 41 Minn. 522, 43 N. W. 394, as follows:

"Where a contract, specifying one certain sum as liquidated damages, contains various stipulations, to all of which the clause as to damages is clearly applicable, such stipulations either varying greatly in their character and importance, or being of such a nature that the damages from a breach of some of them could be easily and certainly

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measured, and especially if such damages would obviously be inconsiderable as compared with the sum stated in the agreement as damages, the latter should be regarded as a penalty, and not as liquidated damages."

This rule, however, is stated in the abstract, and its application manifestly depends largely upon the intention of the parties as to what provision of their contract the stipulation as to damages is designed to apply. We think that the instant case is not within the rule, and that this conclusion is inevitable from a reading of the whole contract and a consideration of the circumstances of the parties. Moreover, the parties gave the contract a practical construction which accords with our conclusion when they left the $200, put up by the plaintiff, on deposit long after every other covenant and condition of the contract, except that relating to the reletting of the building, must have been performed. We hold that the provision in question was for liquidated damages, and not for a penalty.

3. As to the measure of damages in the instant case, we hold that if the contract of date July 21, 1910, is valid—and the jury evidently found that it was—and if at the time of its execution the defendant knew of the contract between the plaintiff and Williamson of date July 9, 1910, and of the plaintiff's undertaking therein that the building referred to would not be let for the purpose of carrying on a mercantile business therein during the remainder of the plaintiff's term, all of which the jury likewise must have found under the instructions of the court, then the right of the plaintiff to recover the $200 is clearly sustained by the rule of Hadley v. Baxendale that such sum may be recovered as may reasonably be supposed to have been contemplated by the parties, when making the contract, as the probable damage which would result from its breach.

4. Was the defendant entitled to judgment notwithstanding the verdict? The rule governing such application is thoroughly settled. Such relief is not proper where the evidence offered, if true, establishes a cause of action, nor where there is a clear conflict in the evidence. Hess v. Great Northern Ry. Co. 98 Minn. 198, 108 N. W. 7, 803. Nor is it alone sufficient that the evidence is such that

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the trial court might properly, in the exercise of its discretion, grant a new trial; and if there is some evidence reasonably tending to prove a cause of action, the application should not be granted. 2 Dunnell, Minn. Dig. § 5082.

As stated, the trial court granted the defendant's motion on the sole ground that there was no sufficient evidence of the defendant's letting of the building to Greiner & Co., and, further, that it was shown that the defendant did not let the building, but, on the contrary, sold or traded it. We think, however, that the court was wrong in the premises, and, furthermore, that there was no valid ground for the defendant's motion.

An apparently reputable witness, whose testimony was unimpeached, testified as follows, as shown in the paper book at folio 134, et seq.: "Q. Did Mr. Schultz ever tell you he rented it [the building] to anybody else? A. Yes. Q. After Berghuis went out? A. Yes. Q. To whom did he say that he rented it? A. He said to me that he rented it. Q. To what parties did he say that he rented it? A. Greiner & Co. Q. Do you remember what time he told you that? A. It must be some time in September. Q. 1910? A. Yes." And at folio 181 we find testimony from the same witness as follows: "Q. You testified on cross-examination that Mr. Schultz told you that he rented this building? A. Yes. Q. Did Mr. Schultz tell you for how much per month he rented this building? A. Yes. Q. How much did he say he was renting it for? A. He said that he rented it for $25 per month. Q. Did he say to whom? A. Yes. Q. To whom? A. Greiner & Co."

The only testimony contradicting the above was given by the defendant. He testified that he did not rent the building, but, on the contrary, that before Greiner & Co. went in he traded it for some land in North Dakota on which he paid the taxes, and that after such trade he was paid for repairing the building. His testimony, however, was very unsatisfactory. At folio 69, et seq., of the paper book, we find him testifying that he could not remember the date of the claimed sale of the building, or even when it was made, or how long after the lease was signed. At folio 103, et seq., he testified that he did not remember the time when he traded off the building,

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because he did not know, and that it was impossible for him to remember; that he never made a deed to the building property; that the trade was made with Mr. Greiner, but that he never received a deed for the Dakota land, and that Greiner had received no deed for the store; that he could neither tell nor remember how long ago the trade was made; that he expected to get a deed after he had paid off a mortgage on the store; that no money was paid him when the trade was made, and no writing was executed; that he had not seen the Dakota land, could not tell in what county it was, and did not remember what town it was near.

This, and similar testimony given by the defendant, is the proof of a trade or sale, as distinguished from a letting, to which the trial court adverts in its memorandum; but, frankly, we are not at all impressed with its reliability. It reminds us of a conversation from Robert Louis Stevenson's "Kidnapped," between Allan Breck and David Balfour: " 'Can you swear that you don't know him, Allen?' asked David, referring to the Appin murderer. 'Not yet,' replied Allan; 'but I've a grand memory for forgetting, David.' " Indeed, it can hardly be said that such testimony creates a conflict in the evidence on the issue in question. Certainly it was insufficient to warrant the trial court's utter disregard of the positive testimony as to the defendant's admissions. We hold, therefore, that the trial court erred in granting the defendant's motion for judgment notwithstanding the verdict.

It is ordered that the trial court's order granting the defendant's motion for judgment be reversed; but, the defendant having moved for a new trial in case his motion for judgment were not granted, it is further ordered that the defendant be given leave to apply to the court below for a new trial upon the single issue as to whether the defendant did "rent" or "let" the building therein involved subsequently to August 1, 1910, and prior to August 1, 1911.

Order reversed, with directions.

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G. WILLIS PETERS v. CITY OF DULUTH and Others.[1]

July 26, 1912.

Nos. 17,639—(202).

Registration of title — demand for jury trial.

In proceedings to register a land title, under R. L. 1905, c. 65, commonly known as the Torrens law, no appeal lies from a denial of a defendant's application for a jury trial, nor from an order denying a defendant's motion to dismiss the application.

Same.

Neither the registration act nor the general law of the state confers any absolute right to a jury trial upon any of the issues that may arise in registration proceedings.

Right of trial by jury.

Const. Art. 1, § 4, providing that "the right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy," does not apply to a proceeding, under R. L. 1905, c. 65, to register a land title.

Act not unconstitutional.

Section 3389 of this chapter, relative to dismissals of applications to register, does not render the act invalid as in violation of Const. Art. 1, § 8, declaring that there shall be a remedy for every wrong, etc.

Registration of title.

The right to apply for the registration of a land title is not affected by the availability or adequacy of other remedies.

Application by the sole surviving trustee under the last will of John L. Dodge, deceased, to the district court for St. Louis county, to register title to land under the Torrens law. Louis Polinsky, one of the defendants brought into the proceedings in accordance with the report of the examiner, filed his answer, and demanded a trial by jury. He also moved that the proceeding be dismissed upon the grounds enumerated in the first paragraph of the opinion. From

[1] Reported in 137 N. W. 390.

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an order, Dancer, J., denying the motions, defendant Polinsky appealed. Dismissed.

J. B. Arnold and *B. M. Goldberg,* for appellant.

Crassweller, Crassweller & Blu, for respondent.

PHILIP E. BROWN, J.

Application to register title under the Torrens law. The application showed and the examiner found title in the applicant proper for registration, and also that the land was unoccupied, except that the appellant, Louis Polinsky, and several others were using the same for pasture purposes, as licensees at will, under an oral license from the applicant. The examiner further found that the said Polinsky had erected a small barn upon part of the premises, and recommended that the said persons should be made parties to the proceeding, and that the applicant be granted the relief prayed. The said Polinsky, having been made a party, filed an answer, claiming fee ownership by adverse possession of the land covered by the application; and, further, that the court had no jurisdiction to try the action, and that the form of action was not such as was required by the Constitution or statutes to try the right of possession of lands; and upon the issues made by the application and the answer he demanded a jury trial. This demand was denied; whereupon he moved to dismiss the action on the following grounds: (1) Because it appears on the face of the proceedings that the defendant Polinsky is in the actual and also the adverse possession of the land; and hence that the court had no jurisdiction to try the action and to determine the rights of the parties therein. (2) Because the action, by the pleadings, is one to determine the right of possession of real estate against a party in possession, and the defendant has been refused a jury trial; and, further, because the registration act is unconstitutional and void as to the defendant. (3) Because the registration act does not provide for the trial of the rights of the defendant on the merits; and hence is unconstitutional and void as to the defendant. This motion to dismiss was denied, and from the order denying the defendant's demand for a jury trial, and also the order denying his motion to dismiss, he appealed.

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The appellant's contentions, as reformulated in his brief, and in the order in which we will consider them, are: (1) That the refusal of the court to grant a jury trial was a denial of a right guaranteed by Const. Art. 1, § 4; (2) that the court had no jurisdiction to try the action on the showing of possession, for the reason that the law under which the application is made does not provide for a complete trial of the issue under Const. Art. 1, § 8; (3) that the applicant has a plain and adequate remedy at law, which appears on the face of the proceedings, to wit, ejectment; and that the action should be dismissed on this account.

1. At the outset we are confronted with a question, not insisted upon by the respondent, but necessary, nevertheless, to be considered, namely, the appealability of the orders appealed from, and we hold that they are not appealable. In view, however, of the importance of the questions involved, we have decided to discuss the case upon its merits.

2. The statute under consideration is more or less similar to the registration acts of a number of other states, and provides for what is commonly called the "Torrens System" of registration of land titles; such system being named after Sir Robert Torrens of South Australia, who first introduced it into use among English-speaking people, though a similar system had been in vogue in some parts of the present German Empire for many years. Tiffany, Real Property, p. 1101. It is worthy of notice, in this connection, that Sir Robert was not a lawyer. He was a collector of customs, and very probably he worked out his system through analogy to the method by which the government furnished a certificate as evidence of one's ownership of a vessel. Manifestly his intent was to free land titles from the indictment of common sense, which is often framed in the impatient and seemingly unanswerable question: Why should there be any greater uncertainty of ownership of land than of personalty, and why should land titles have to be searched through a "godless and profitless jungle?"

The system was introduced into South Australia in 1858; and while, since that time, it has found more or less favor with people of English extraction, it seems that it yet has thorny paths to tread. Its

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author, as aptly said by the writer of the learned and interesting article on this system in 54 Central Law Journal, 285, "little knew, we may assume, the immeasurable distance which the common law had placed between rights of ownership of real estate and of personal property. He never dreamed that, out of the dead past, the ghostly hand of the 'unknown claimant,' the 'party entitled to notice,' 'the person under disability,' 'the absent defendant,' and other well-known spooks clad in the dignity of judicial decisions of many generations, is held able to stretch out and fasten upon real property as distinguished from personalty." Nor, we may add, did he foresee the narrow path the system would have to tread through the many and various limitations of the American Constitution, before it could establish itself in the states of the American Union. Yet such has been the case; and, while its constitutionality has been vindicated in this and also a number of other states, as against assault made upon various grounds, undoubtedly it yet has further tests to undergo in such regard—witness the attack in the instant case.

Ohio seems to have enacted the first act adopting the Torrens system; but such act was promptly declared unconstitutional as not providing for sufficient notice, and for lack of judicial proceedings. State v. Guilbert, 56 Oh. St. 575, 629, 47 N. E. 551, 38 L.R.A. 519, 60 Am. St. 756. Illinois came next, with an act which, after amendment, was declared constitutional in People v. Simon, 176 Ill. 165, 52 N. E. 910, 44 L.R.A. 801, 68 Am. St. 175. Next came Massachusetts, with an act which was sustained in Tyler v. Judges, 175 Mass. 71, 55 N. E. 812, 51 L.R.A. 433, and then followed California, Colorado, Oregon, and Minnesota; the acts of the two former being declared constitutional in Robinson v. Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. 90, 12 An. Cas. 829, and People v. Crissman, 41 Colo. 450, 92 Pac. 949, respectively, and the Minnesota law being sustained in State v. Westfall, 85 Minn. 437, 89 N. W. 175, 57 L.R.A. 297, 89 Am. St. 571.

The attacks upon the various acts mentioned were based upon one or more of the grounds urged in the case last cited, viz., denial of due process of law, violation of the constitutional provision relative to the severance of the three several departments of government, viola-

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tion of provisions relative to the election of county officers and provisions relative to special legislation; but in each instance, as above recited, except in Ohio, the law has been sustained.

It would seem that, in the course of the attacks upon the validity of the system in question as a law, the grounds of attack would have been exhausted, and that we would have some direct precedent to guide us in the instant case; but we have neither been cited to nor found any case directly in point, and must, therefore, determine the questions here involved practically as of first impression, though not without abundant analogies and authorities upon the basic principles upon which our determination must rest. Furthermore, the history of the Torrens system, as briefly outlined above, may well be considered as shedding considerable light upon the intent and purpose of the system in general and in our own state in particular, and as thus affording some assistance in determining the nature of the proceedings by which a Torrens title is perfected; for upon such latter consideration the vulnerability of the statute to the present attack largely depends.

3. One other question presents itself before we come directly to the constitutional questions here involved, and that is whether, under the registration act and the general laws of the state, the appellant was entitled to a jury trial in the instant case; for, if he was so entitled, no constitutional right to a jury that he may have had can have been violated by the statute, and there would be only a judicial error involved in this branch of the case. However, we are satisfied that neither such statute nor the general law contemplates a jury trial as a matter of right. The provision of the registration act relative to trial is as follows:

"3388. **Trial—Reference.** Where an answer is filed, the case shall be tried by the court in like manner as an ordinary civil action. The court may refer the case, or any part thereof, to one of the examiners, as referee, to hear the parties and their evidence, and make report thereon to the court. Any report of an examiner shall have the same weight as that of a referee appointed by the district court. After the filing of such report, the court may order such other or further hearing of the cause before the court, or before the

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examiner, and may require such other or further proof by either or any of the parties to the cause as it shall deem proper."

Manifestly there is here no affirmative expression of an intent that any issue in the proceedings shall be tried by a jury. Indeed, it would seem that the contrary was intended. Nor is any right to a jury in these proceedings conferred by the general law, which is as follows: (R. L. 1905, § 4164.)

"In actions for the recovery of money only, or of specific real or personal property, or for a divorce on the ground of adultery, the issues of fact shall be tried by a jury, unless a jury trial be waived or a reference be ordered. All other issues of fact shall be tried by the court, subject to the right of the parties to consent, or of the court to order, that the whole issue, or any specific question of fact involved therein be tried by a jury or referred."

The only provision here which could possibly be invoked as giving the right to a jury trial in registration proceedings is that relative to the recovery of specific real property, and suffice it to say that no such recovery is contemplated by the registration act, and none can be had thereunder. Whether, under such act or the general law, the court, in its discretion, could order a jury trial is not here involved and was not argued, and we do not deem it necessary to determine.

4. The next question, then, is, Does the constitutional provision relative to the right to a trial by jury apply? In Massachusetts it has been held that the right to a jury trial cannot be denied in registration proceedings, where the title to real property is involved (Weeks v. Brooks, 205 Mass. 458, 92 N. E. 45); but the constitutional provision in that state is that there shall be a right to a jury trial "in all controversies concerning property" (Const. Mass. 1780, Pt. 1, Art. 15), which is very different from the provision of our Constitution. The latter (Article 1, § 4) provides:

"The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy."

It is settled beyond question that this provision merely preserves the right to trial by jury as it existed at the time of the adoption of

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the constitutional provision. State v. Kingsley, 85 Minn. 215, 88 N. W. 742; State v. Minnesota Thresher Mnfg. Co. 40 Minn. 213, 41 N. W. 1020, 3 L.R.A. 510; In re Howes, 38 Minn. 403, 38 N. W. 104; Bruggerman v. True, 25 Minn. 123; Board of Commrs. of Mille Lacs County v. Morrison, 22 Minn. 178; Ames v. Lake Superior & Mississippi R. Co. 21 Minn. 241; Whallon v. Bancroft, 4 Minn. 70 (109). Said Gilfillan, C. J., in Board of Commrs. of Mille Lacs County v. Morrison, supra, at page 181, after making an extensive review of the cases from this and other states and announcing the rule as we have stated it:

"It is not, of course, to be understood from this that the right to a jury trial will depend on the form of the action or proceeding, or that the legislature may, by changing the form of proceeding or remedy, take that mode of trial from those rights to which the Constitution intended to secure it. The Constitution of Vermont provides: 'Trial of issues proper for the cognizance of a jury in the supreme and county courts, shall be by jury, except when parties otherwise agree.' This, though differently expressed, is substantially the same as the provision in the Constitution of this state. The Supreme Court of Vermont, discussing this clause in Plimpton v. Town of Somerset, 33 Vt. 283, said: 'All rights, whether then or thereafter arising, which would properly fall into those classes of rights to which, by the course of common law, the trial jury was secured were intended to be embraced within this article.' This is the best definition that we have found of the classes of cases to which the trial by jury is secured; for it makes the right to such a trial depend on the nature and character of the controversy, and not on the form of action or proceeding in which it is to be determined."

Again, the rule, as stated in Lommen v. Minneapolis Gaslight Co. 65 Minn. 196, 209, 68 N. W. 53, 54 (33 L.R.A. 437, 60 Am. St. 450), and approved in State v. Kingsley, supra, is that, under the Constitution, parties are entitled to a jury trial "in those cases in which they were entitled to jury trial by the laws of the territory at the time of the adoption of the Constitution."

The question before us, then, is: What is the real nature of the proceedings under the registration act, and do the issues which arise therein, and, specifically, the issue of title here involved, make cases,

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or a case, in which the parties would have been entitled to a jury trial prior to the adoption of the Constitution?

The registration act is too long to set out herein; nor do we deem it necessary to refer specifically to its various provisions in detail. In discussing the general question of the constitutionality of the Torrens laws, we have already pointed out the general purpose of such laws, viz., to clear up and settle land titles; and there is at once suggested the question as to what the existing or former remedies for this purpose were, the answer to which is, quieting title and removal of cloud. And such has been declared to be the nature of registration proceedings. See Tiffany, Real Property, § 488, p. 1101; State v. Westfall, 85 Minn. 437, 89 N. W. 175, 57 L.R.A. 297, 89 Am. St. 571. See also Owsley v. Johnson, 95 Minn. 168, 103 N. W. 903, where the proceeding is declared to be an equitable one.

"It is now the settled doctrine of this court," said Chief Justice Start, in State v. Westfall, supra, at page 444, [89 N. W. 177, 57 L.R.A. 297, 89 Am. St. 571], "that the district courts of this state may be clothed with full power to inquire into and conclusively adjudicate the state of the title of all land within their respective jurisdictions. * * * The proceeding provided for by the act in question is such a one. * * * To hold otherwise would be to hold that the courts of this state cannot in any manner acquire jurisdiction to *clear and quiet the title to real estate.* * * * That the courts of this state have jurisdiction to so *clear and quiet title* by their decrees is no longer an open question in this state." We have italicized certain words in the above quotation. The Chief Justice was discussing the constitutionality of the registration act, with reference to the service of process and due process of law, and by the deliberate use of the analogy adopted clearly indicates the court's conception of the nature of the registration proceedings.

However, even if we had no precedent to guide us, we think it clear, from a mere reading of the statute, that such is the nature of the proceeding provided for thereby; and, such being the case, it follows that the constitutional right to a jury trial does not apply. There was no such right upon the ancient bill to remove cloud and

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quiet title, and it has been held in this state that the constitutional guaranty does not apply thereto. Yanish v. Pioneer Fuel Co. 64 Minn. 175, 66 N. W. 198. It was held in that case that the defendant had no right to a jury trial in an action by an assignee in insolvency to set aside an execution sale and to cancel the record of the plaintiff's certificate. Said the court at page 179 [66 N. W. 200]:

"The next question arises upon the right of the defendant to a jury trial. This action was not brought for the recovery of money only, or of specific real or personal property. Title to the real estate in question passed to the respondent by virtue of the deed of assignment, and the defendant's judgment, and its sale of the property under the execution on the judgment, constituted a cloud upon the respondent's title to the property; and he had a right to invoke the equitable power of the court to remove the cloud of an apparent lien of the judgment, set aside the sheriff's sale, and cancel the sheriff's certificate. Such an action is not triable by a jury. Although the practical result would be the recovery of the property, yet the gist of the action is to get rid of a cloud resting upon the title, and thus make the property available as assets for the payment of the insolvent's creditors."

Again, it has been held that such provision does not apply to the statutory action to determine adverse claims. Roussain v. Patten, 46 Minn. 308, 48 N. W. 1122; Johnson v. Peterson, 90 Minn. 503, 97 N. W. 384. Said Collins, J., in delivering the opinion of the court in the latter case: "Except as otherwise provided by statute, all the ordinary rules governing suits in equity to quiet title apply to this action, and it was triable by the court, and not by a jury; * * * and the fact that the answer contained a counterclaim in the nature of ejectment did not change the procedure."

Exactly in line with the above authorities, and only a step in advance, it seems to us, is it to hold that neither is there any constitutional guaranty of a jury trial in this registration proceeding, which, to our mind, is nothing more or less than an enlargement of the remedy to quiet title. The fact that the ultimate right of possession may be involved does not change the nature of the proceeding. Such right

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is involved in all actions concerning the title to real property. Buffalo Land & Exploration Co. v. Strong, 101 Minn. 27, 111 N. W. 728; Tew v. Webster, 106 Minn. 185, 118 N. W. 554; Bracken v. Trones, 118 Minn. 18, 136 N. W. 281. If, therefore, we should adopt the rule contended for by the appellant and apply it to its logical limit, then every action wherein the title to real property was in question would necessarily be for a jury. Such was not the law in territorial days, and is not now.

5. The appellant's other constitutional point is that the statute violates Const. Art. 1, § 8, which is as follows:

"Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely and without purchase; completely and without delay, conformably to the laws."

This provision, the appellant claims, is violated by the following provision of the statute (R. L. 1905, § 3389):

"Dismissal—If the court shall find after hearing that the applicant has not a title proper for registration, an order shall be entered dismissing the application, which may be without prejudice. The applicant may upon motion dismiss the application at any time before the final decree entered upon such terms as shall be fixed by the court."

It is contended that this provision precludes a final adjudication of the defendant's rights in any case, and in the instant case precludes an adjudication of his claim of title by adverse possession; and that for this reason the statutory proceeding is invalid. We cannot sustain this contention. As pointed out in the respondent's brief, the same objection may, to a certain extent, be urged against any civil action in which the defendant files no counterclaim.

The constitutional provision, furthermore, relates primarily to the assertion of affirmative rights, and the defendant here, being in possession, had the right, prior to the proceeding here involved, to clear up his title, if any he had, by an action to quiet title; and in the present proceeding the court is abundantly authorized and empowered to adjudicate his title completely and fully as against the applicant (Hendricks v. Hess, 112 Minn. 252, 255, 127 N. W. 995;

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Reed v. Siddall, 94 Minn. 216, 102 N. W. 453), which is all that is accorded the defendant in any civil action, except where he takes the proper steps for affirmative relief. This provision has been held not to create any new right, but to be merely a declaration of a general, fundamental principle. Francis v. Western Union Tel. Co. 58 Minn. 252, 59 N. W. 1078, 25 L.R.A. 406, 49 Am. St. 507; Beaulieu v. Great Northern Ry. Co. 103 Minn. 47, 114 N. W. 353, 19 L.R.A.(N.S.) 564, 14 An. Cas. 462. That class of provisions to which the one here in question belongs is "not, and from the nature of the case cannot be, so certain and definite as to form rules for judicial decisions in all cases, but up to a certain point must be treated as guides to legislative judgment, rather than as absolute limitations of their power." Allen v. Pioneer Press Co. 40 Minn. 117, 123, 41 N. W. 936, 938 (3 L.R.A. 532, 12 Am. St. 707). It has also been held that this provision is not violated solely because the granting of the remedy rests in the sound discretion of the court. Wieland v. Shillock, 24 Minn. 345. The statute in question merely vests in the court the power, to be exercised in its sound discretion, to save the applicant's rights in a proper case, and does not violate the constitutional provision invoked against it.

6. The appellant's last contention is that, as the applicant was out of possession and the appellant was in possession, the former had a plain and adequate remedy at law; and that hence the application to register should have been dismissed. The contention is that the act contemplates registration only at the instance of a fee title owner in posssession, and not by an "apparent owner," who is not in possession. We think, however, that this contention cannot prevail. The purpose of the statute is to provide a speedy and summary remedy to clear up title to land. Reed v. Siddall, 94 Minn. 216, 102 N. W. 453. The remedy provided is not a substitute for an action of ejectment, as we have already noted, and a successful applicant may have to resort to ejectment to obtain possession. The statute, furthermore, in several places makes provision looking to cases where the land is occupied by another than the applicant, among which is the following (R. L. 1905, § 3375), relative to the contents of the application, subd. 6:

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"Whether the land is occupied or unoccupied. If occupied by any other person than the applicant, it shall state the full name and address of each occupant, and the nature of the estate, interest, lien or charge which such occupant or occupants have, or claim to have, in the land."

See also State v. Westfall, supra; Kuby v. Ryder, 114 Minn. 217, 130 N. W. 1100. Nor can we sustain the contention that the applicant's title must be settled before he can apply. The very purpose of the proceeding is to settle the title. See State v. Westfall, supra; National B. & S. Co. v. Alderson, 99 Minn. 137, 108 N. W. 861; Hendricks v. Hess, supra.

Since, then, the right to invoke the remedy is given by the statute, the adequacy and availability of other remedies are immaterial. Moreover, the relief in ejectment is not coextensive with that which may be had upon an application to register. As against any one party or set of parties, it may be practically the same; but it needs no argument to show that a title could never, in ejectment, be settled as against the whole world, as can be done upon an application to register. And, conversely, relief may be had in ejectment which cannot be had in the registration proceeding, viz., possession of the premises. The remedies are distinct and different; and hence the appellant's point in this regard is not well taken.

Appeal dismissed.

STATE v. ALBERT G. SMITH.[1]

July 26, 1912.

Nos. 17,649—(7).

Indictment for perjury — objections overruled.

Objections to an indictment for perjury as being indefinite, uncertain, and insufficient to inform the defendant of the crime with which he is charged, considered and overruled.

[1] Reported in 137 N. W. 295.

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Evidence of attempt to commit crime competent.

On a prosecution for a crime, testimony tending to prove an attempt to commit such crime is competent and material, and may, if false, constitute the predicate for a subsequent charge of perjury.

Subsequent prosecution for perjury.

The fact, therefore, that the corpus delicti of the crime charged is not established will not preclude a subsequent prosecution for perjury predicated upon false denials of a prior confession or admission of the crime charged.

Same — based on testimony at prior prosecution.

An acquittal upon a prosecution for a crime is not a bar to a subsequent prosecution for perjury predicated upon testimony given upon such former prosecution, unless a conviction of the charge of perjury would necessarily import a contradiction of the jury's verdict upon the former trial.

Assignments of error.

Certain assignments of error considered and disposed of.

Defendant was indicted by the grand jury of Hennepin county and convicted of the crime of perjury in the district court for that county. From a judgment, Booth J., sentencing him to hard labor in the state prison until discharged by due course of law or by competent authority, defendant appealed. Affirmed.

A. C. Middlestadt, for appellant.

Lyndon A. Smith, Attorney General, *James Robertson,* County Attorney, and *Erland Lind,* Assistant County Attorney, for the State.

Philip E. Brown, J.

On September 26, 1911, the grand jury of Hennepin county returned an indictment charging the defendant with the commission of the offense of arson in the second degree by wilfully, in the nighttime, on September 22, 1911, setting fire to and burning a certain described shed situated in the said county. The defendant, on his arraignment, entered a plea of not guilty, and thereafter, on October 10, 1911, he was tried on this indictment by a jury. On the trial the state offered evidence tending to show, in substance and among other facts, (a) that on September 22, 1911, the defendant was at or near the shed which he was charged in the indictment with burn-

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ing, and that one Taylor saw him there; (b) that on September 25, 1911, the defendant, when being arraigned in the municipal court of Minneapolis on a complaint charging him with the commission of the same criminal acts which were alleged in the subsequent indictment, admitted that he had committed the acts charged in such complaint; (c) that on September 23, 1911, the defendant admitted to one Mealey and others named that he had, on the evening of September 22, 1911, set the fire in the shed; (d) that one Kixmoeller, on the same day, made stenographic notes of the defendant's statements, just recited, in a book, to which notes the defendant signed his name.

The court charged the jury on the trial of the said indictment in effect that the evidence on the part of the state was insufficient to justify a finding that any part of the shed was burned, or to sustain a verdict of guilty of arson in the second degree, but that, under the evidence, they might find the defendant guilty of an attempt to commit the offense charged in the indictment. The jury returned a verdict of not guilty.

Thereafter the defendant was charged, by indictment in the same county, with perjury, alleged to have been committed on the trial upon the said indictment for arson; the assignments of perjury being predicated upon the defendant's denials, made on the trial of the indictment for arson, wherein he denied the matters above set out in subdivisions marked (a) to (d) inclusive. The defendant was tried by a jury on the perjury indictment, and was convicted and sentenced. This is an appeal from the judgment. For convenience we will hereafter sometimes designate the trial for arson as the first trial and the trial for perjury as the second trial.

1. The defendant claims that the indictment for perjury is indefinite and uncertain, and does not disclose the facts necessary to inform him of what crime he is charged with having committed; and, furthermore, that the indictment does not state that the defendant has committed any public offense. The indictment covers more than nine pages of the paper book, and hence is too long to set out herein. It has been examined, however, with care, and, in the absence of any assignment of the particular respects in which it is claimed to be in-

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definite and insufficient, we hold that the objections cannot be sustained.

2. The issues in this case are involved in the question: Did the defendant wilfully testify falsely on the arson trial concerning material facts as charged in the indictment in the instant case?

The first question, then, in examining this record for the purpose of ascertaining whether any of the errors assigned were committed, is: What were the issues on the first trial?

Second: What was the testimony of the defendant thereon concerning the material facts? And

Third: Did the defendant wilfully testify falsely as to those material facts as charged in the indictment in the instant case?

One issue on the face of the indictment on the first trial was: Did the defendant wilfully set the shed on fire as charged? But this was not the only issue; for our statute (R. L. 1905, § 4771) provides that "an act done with intent to commit a crime and tending, but failing, to accomplish it, is an attempt to commit that crime." Otherwise defined, an attempt to commit a crime is an attempt to do the act constituting the crime, coupled with the doing of an act or acts tending to consummate such intention, but ineffectual as a matter of fact (State v. Miller, 103 Minn. 24, 114 N. W. 88); and section 4757 provides that upon the trial of an indictment the defendant may be convicted, among other things, of an attempt to commit the crime charged, or of a lesser degree thereof. The effect of these statutes is to render always admissible any evidence tending merely to show an attempt to commit the crime charged in the indictment; such evidence being material and competent for the reason that the ultimate issue to be determined by the jury may be simply as to whether the defendant attempted to commit the crime charged, and this is exactly what occurred in the instant case. That the defendant wilfully testified falsely on the first trial, as charged in the perjury indictment, was established, we think, beyond reasonable doubt in the instant case; and that such testimony concerned the material facts in issue under the indictment and the defendant's plea thereto in the first trial is likewise clear as a matter of law. We must hold, then, that, in the absence of errors of law occurring

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on the trial of the charge of perjury, the defendant was properly convicted of such charge.

3. The defendant claims that numerous prejudicial errors of law occurred on the trial; such claims, as expressed by the defendant's counsel in his brief, being practically as follows: (1) That the state failed to establish the substantial and fundamental facts necessary to the commission of the crime of arson as a result of criminal agency; or, in other words, that the corpus delicti was not established on the first trial. (2) That a wilful attempt to burn a building by setting on fire waste paper therein, whereby its walls were scorched but not burned, does not constitute arson in the second degree, or any other public offense against the state. (3) That the admissions or confessions of the defendant set out in the second indictment were improperly admitted in evidence on the trial thereof, because the state failed to first establish the corpus delicti on the first trial, and particularly that the admission of the testimony of the witnesses Mealey, Price, and Ohman on the second trial, to the effect that the defendant admitted to them that he set fire to the shed, constituted error for the same reason. (4) That the court erred in permitting the witness Larson to testify, because he was not a witness on the first trial; and, further, that the indictment does not charge the defendant "with any confession made by the defendant to the said Larson." (5) That the witnesses Eichler, Compton, and Charles L. Smith, who testified in effect on the second trial that after the complaint made in the municipal court above mentioned had been read to the defendant he admitted that he had committed the acts charged in such complaint, were not witnesses on the first trial, and that no confession was made to them, or other persons, and that the indictment does not charge that any false testimony was given by this defendant upon the confession and statement made by him to the said Eichler, Compton, and Smith, and that for these reasons the court erred in the admission of their testimony. (6) That the court, in its instructions, referred to the statements claimed to have been made by the defendant to the witnesses Mealey, Price, and Ohman, and also to Compton, Eichler, and Charles L. Smith, as being admissions instead of confessions, and that the jury were thus misled, and that

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such was error. (7) That, when an indictment for perjury charges that the accused made material admissions or confessions to one or more named persons, it is a variance and error to permit others, not named therein, to testify that they overheard the defendant make such admissions or confessions.

We cannot sustain any of these contentions. So far as they are based upon the alleged absence of proof of the corpus delicti, we have already in effect held them to be unfounded, by determining that the defendant could have been convicted of the offense of an attempt to commit the crime of arson, notwithstanding that the indictment charged him with the offense of arson in the second degree. To hold otherwise would virtually open the door for the commission of untrammeled perjury whenever offenses were divided into degrees, and in all cases of attempts not directly charged as such in the indictment. We are aware of no rule which requires or would justify such a pronouncement.

The alleged error in subdivision 6, above mentioned, if the defendant is correct in his position, not having been called to the attention of the trial court when the jury were charged, is unavailing. 3 Dunnell, Minn. Dig. § 9798. The other claims, above enumerated, are without merit and require no discussion.

4. The defendant claims that in no event could he be legally convicted in this action, because the judgment of not guilty, rendered in the arson case, was ipso facto res adjudicata and a bar to his subsequent prosecution for any perjury committed by him on that trial. There are some authorities in the books which may be fairly claimed to so hold. See United States v. Butler (D. C.) 38 Fed. 498; Cooper v. Commonwealth, 106 Ky. 909, 51 S. W. 789, 59 S. W. 524, 45 L.R.A. 216, 90 Am. St. 275; Petit v. Commonwealth, 22 Ky. L. R. 262, 57 S. W. 14. The great weight of authority, however, and we think also of reason, is to the contrary. Allen v. United States (C. C. A.) 194 Fed. 664; People v. Albers, 137 Mich. 678, 100 N. W. 908; State v. Caywood, 96 Iowa, 367, 65 N. W. 385; State v. Vandemark, 77 Conn. 201, 58 Atl. 715, 1 An. Cas. 161; State v. Williams, 60 Kan. 837, 838, 58 Pac. 476; Hutcherson v. State, 33 Tex. Crim. App. 67, 24 S. W. 908; State v. Bevill, 79 Kan. 524, 100 Pac. 476,

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131 Am. St. 345, 17 An. Cas. 753; State v. Cary, 159 Ind. 504, 65 N. E. 527. See also Mr. Freeman's note on page 29 of 103 Am. St. and note on page 423 of 74 Central Law Journal. The legal principles involved under this claim, as applied to the present indictment, and the proofs received thereunder, have been so fully discussed in the authorities last referred to, and the rule here applicable is so well established thereby, that further discussion is, we think, unnecessary.

We hold that the rule applicable to the instant case is that, unless a conviction of the charge of perjury necessarily imports a contradiction of the jury's verdict of not guilty in the arson case, then the prosecution for perjury is not barred; and, further, that no such contradiction here appears.

Judgment affirmed.

ELIZA IBS v. HARTFORD LIFE INSURANCE COMPANY.[1]

July 26, 1912.

Nos. 17,672—(200).

Default in payment of premium — excuse.

In an action upon an insurance policy, it is *held* that a prima facie valid excuse for an apparent default in the payment of certain dues and assessments was shown by the evidence, and that the court erred in dismissing the action at the close of plaintiff's case.

Forfeiture of policy — burden of proof.

The law will indulge in no presumptions favorable to a forfeiture, and the burden to establish one is upon the party invoking it.

Same — accounting by insurer.

Where a life insurance company has in its possession or under its control money belonging to the insured, which the policy provides shall be applied in reduction of dues and assessments, before the company can be heard to declare a forfeiture for the nonpayment of dues, it must account for and so apply such money.

[1] Reported in 137 N. W. 289.

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Action in the district court for Ramsey county to recover $2,000 upon a certificate of life insurance. The substance of the pleadings will be found in the second paragraph of the opinion. The case was tried before Brill, J., who, when plaintiff rested, dismissed the case. From an order denying plaintiff's motion for a new trial, he appealed. Reversed and new trial granted.

O. E. Holman, for appellant.

James C. Jones and *Durment, Moore & Sanborn,* for respondent.

BROWN, J.

Action to recover upon a certificate of insurance issued by defendant upon the life of Herman Ibs. At the close of plaintiff's case in the court below the action was dismissed, and plaintiff appealed from an order denying a new trial.

Defendant, an insurance corporation of the state of Connecticut, issued to Ibs on April 4, 1885, its certain policy or certificate of insurance, whereby, in consideration of the payment of dues and assessments as therein provided, it agreed, upon his death, to pay to plaintiff, his wife, the sum of $2,000. Ibs died on June 27, 1910. Proper proofs of death were made, defendant refused payment, and plaintiff thereafter brought this action to recover upon the contract. The complaint set out the contract, alleging a compliance with all the conditions thereof by the insured, and demanded judgment for the amount due. Defendant interposed in defense the failure of the insured to pay the dues and a certain assessment which were due and payable June 20, 1910, alleging that by reason of this default the certificate of insurance became null and void. Plaintiff in reply admitted the failure of the insured to pay the dues and assessments referred to, but denied that the failure avoided the contract, and affirmatively alleged that the assessment, which amounted to $33.95, was not authorized by the contract, and was an unlawful, and not a proper, charge against the insured.

At the trial below, before the court and a jury, plaintiff offered the insurance certificate in evidence and rested her case, whereupon defendant moved to dismiss the action, on the ground that plaintiff had failed to make out a case. The court ruled that inasmuch as

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the reply to defendant's answer admitted the failure to pay the dues and assessment, for which failure defendant claimed the policy was void, the burden was upon her to overcome the effect of the apparent default. The court, however, permitted plaintiff to reopen the case, and further evidence was then offered by plaintiff, covering not only the question whether strict compliance with the contract in respect to the prompt payment of dues and assessments was waived by defendant, but also evidence bearing upon other issues presented by the pleadings. Plaintiff again rested, and defendant renewed the motion to dismiss, which the court granted. The trial court held that the failure to pay the dues in June, 1910, though coupled by the company with a demand for the amount of the assessment, forfeited the policy, even though the assessment was unauthorized. In other words, since the amount of the dues was definite and certain, and the time of payment definitely fixed by the contract, the insured was bound to pay the same, notwithstanding the fact, if it were a fact, that the assessment was unlawful.

The trial court did not, however, expressly pass upon the question whether the assessment was valid, nor upon the further question presently to be mentioned, but based its order of dismissal solely upon the conclusion that a prima facie default on the part of insured appeared from the pleadings, and had not been overcome by the evidence offered by plaintiff.

It is contended by plaintiff that the court erred in dismissing the action for the following reasons: (1) That the assessment of $33.95, and made payable by the "call" of defendant on June 20, 1910, was not authorized by the contract, and that the failure of the insured to pay the same did not forfeit his policy; (2) that since the assessment was illegal the insured did not forfeit his rights by the failure to pay the dues claimed to be due in June, 1910, for the reason that the demand or "call" for the same was coupled with the demand for the illegal assessment, and notice given that unless both were paid the policy would be canceled; (3) that defendant had in its possession at the time of the alleged default certain money, derived from the accumulation of interest upon its safety fund, a fund maintained in the interests of policyholders, which the contract provided should

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be distributed among the several policyholders in reduction of their dues; that the proportion of this fund due to the insured was more than sufficient to pay the dues in question; and that defendant was in duty bound so to apply it.

We deem it inadvisable to attempt finally to determine any of these questions. The dismissal of the action rendered unnecessary a full trial below, and in just what light the questions will appear after all the evidence is presented can only be a matter of speculation. We might hypothetically determine the questions on the theory that plaintiff's contentions will or may be fully substantiated or overcome by the evidence defendant may offer; but the result would necessarily be unsatisfactory, and the proper course to pursue is to defer a final decision until the facts come in.

The validity of the notice calling for the payment of the assessment and dues, and whether the insured was justified in failing or refusing to pay the dues because the notice was coupled with an illegal demand for the assessment, presents an important question in the case. Its solution might to some extent depend upon the question whether defendant was under obligation to give the notice, and whether the insured would have been justified in failing to pay until he received the same. The contract does not expressly require such notice, and whether, by a general and uniform custom in giving it, defendant assumed the obligation, is not made clear by the evidence. The record discloses that notices of special assessments were uniformly given each policyholder, but whether that notice included a demand for the payment of the dues does not appear. Plaintiff's contention that the notice here given, demanding the payment of the assessment and the dues, and in default thereof a cancelation of the insurance contract, was, if the assessment were illegal, insufficient as a basis for the cancelation of the contract, would seem to be sustained by King v. Hartford, 133 Mo. App. 612, 114 S. W. 63. But we do not decide whether the assessment was authorized, or the sufficiency of the notice.

We do, however, hold that the evidence appearing in the record is sufficient, prima facie, to sustain plaintiff's third contention, namely, that at the time of the alleged default defendant had in its possession

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funds which the insured had the right to have applied in reduction of his dues and assessments, and that it was defendant's duty so to apply it to prevent a forfeiture of the contract. If the proportion of this fund applicable to this policy exceeded the dues in question, and if it shall appear when the cause is again tried that the assessment was unauthorized and illegal, it would necessarily follow that the policy was wrongfully canceled and plaintiff may recover. The facts in reference to this branch of the case are as follows:

The contract of insurance required of every policyholder the payment to the company of the sum of $10 for each $1,000 of insurance for the purpose of creating a "safety fund," for the benefit of the insured members. The contract provided for the transfer of this fund to a trustee to be administered in the interests of the policyholders. The contract further provided that the accumulated interest from the fund after it had reached the sum of $300,000 should semiannually be divided pro rata in reduction of the dues and assessments of the policyholders. The fund amounted to $300,000 in 1897, and was subsequently increased to one million dollars. It was invested in interest-bearing securities, and necessarily accumulated a considerable sum each year for distribution.

While the amount on hand at the time of the default here relied upon as a forfeiture does not appear from the record, we are clear that defendant, having possession or control of it, to a part of which the insured was entitled in reduction of his dues and assessments, should, before being permitted to invoke a forfeiture for nonpayment, affirmatively show a proper application of the money; in other words, that the burden was upon defendant affirmatively to establish a forfeiture of the policy by nonpayment of dues and assessments, essential to which would be an accounting for and an application of money presumptively in its possession or under its control applicable to the payment of such dues. The law will indulge in no presumptions favorable to a forfeiture. 29 Cyc. 232; Haas v. Mutual, 84 Neb. 682, 121 N. W. 996, 26 L.R.A.(N.S.) 747, 19 An. Cas. 58.

It seems clear that, if defendant had on hand a sufficient amount of this fund at the time of the alleged default to extinguish the payment demanded, equity and good conscience would require its appli-

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cation thereon and save a forfeiture. The law will so apply it. Price v. Brotherhood of Railroad Trainmen, 116 Minn. 275, 133 N. W. 793.

The contention of defendant that this question was not an issue under the pleadings, and therefore not properly before the court below, is not sustained. The sole issue in the case was the alleged default of the insured, and because thereof the right of defendant to cancel and annul the policy. Properly construed, the pleadings presented the question referred to, and it should have been heard and disposed of. No doubt a full trial of the action will present all the matters referred to clearly, and enable the court to pass upon the merits of all the contentions of plaintiff. The insured had remained a holder of his policy for a period of twenty-five years, and uniformly and punctually paid all assessments and dues levied against him, with the exception of the one now in dispute, levied a short time prior to his death. If facts exist which render a forfeiture of his policy inequitable, unjust, and therefore unlawful, plaintiff should have every opportunity to claim the benefit thereof, and defendant required to show its right to insist upon a forfeiture by clear proof.

The importance of some of the questions now urged by plaintiff seem not to have been sufficiently impressed upon the mind of the learned court below, and this accounts for the dismissal of the action. A full trial will clarify the claims of the respective parties, and enable the court to determine the case upon the merits as then presented.

Order reversed, and new trial granted.

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A. B. IRONS and Others v. INDEPENDENT SCHOOL DISTRICT NO. 2 and Others.[1]

July 26, 1912.

Nos. 17,684—(209).

New school district — evidence.

This appeal involves the formation of a new school district out of a portion of the territory of an independent district, and is from an order denying a motion for a new trial, after a finding by the jury to the effect that the best interests of the territory affected required the formation of the new district. *Held:*

1. The trial court did not err in its rulings as to the admission of evidence.

2. The question of when and under what conditions school districts may be organized, or their boundaries changed, is a legislative one, which has been qualifiedly delegated to the respective county boards of the state.

3. On an appeal to the district court from an order of the county board organizing a new school district, the question must be determined by a consideration of what is for the best interests, present and future, of the people of the territory, considered as a whole.

4. The finding of the jury is not so manifestly against the preponderance of the evidence as to justify the conclusion that the trial court abused its discretion in denying a new trial.

Appeal to the district court for Pine county by Independent School District No. 2 from an order of the board of county commissioners granting the petition of A. B. Irons and others for the formation of a new school district to be known as Common School District No. 93. The appeal was heard before Stolberg, J., who at the close of the evidence denied defendant's motion to direct a verdict in its favor, and a jury which returned a verdict in favor of petitioners, and found that the best interest of the territory affected required the formation of a new school district as prayed. From an order denying its motion for a new trial, Independent School District No. 2 appealed. Affirmed.

[1] Reported in 137 N. W. 303.

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J. F. McGee and *William H. Lamson,* for appellant.

S. G. L. Roberts, Harold Harris and *Ottocar Sobotka,* for respondents.

START, C. J.

On May 15, 1911, a petition, approved by the county superintendent of schools, was filed with the county auditor of the county of Pine for the formation of a new school district, to be known as district No. 93, the territorial limits of which included township 41, range 18. Due notice of the time and place of hearing the petition was given, and it was heard on July 10, 1911. The board of county commissioners made its order, granting the petition. Thereupon Independent School District No. 2, from the territory of which that of district No. 93 was taken, appealed from the order to the district court of the county of Pine, on the ground that the county board had no jurisdiction to act, and that its action was against the best interests of the territory affected by the order. On the trial of the matter in the district court, the question whether the best interests of the territory affected required the formation of the new district was submitted to a jury, and a verdict was returned to the effect that such interests did require the formation of the district, and that the prayer of the petitioners be granted. The independent district then made a motion for a new trial on the grounds of errors of law, and that the verdict is not justified by the evidence, and is contrary to law. The motion was denied, and it appealed from the order.

The appellant here assigns as error the rulings of the trial court in sustaining objections to its three offers of evidence. Only one of such alleged errors is urged in the brief of counsel. The other two are deemed to have been waived by the omission to urge them in the brief; but, this aside, it is obvious that the rulings were correct. The other offer was to show what representations were made to the high school board to secure the selection of the village of Hinckley as the site and location of an agricultural school, and that they did represent that the assessed value of the property within the independent district, which included the territory of the village, was $480,000. It was not error to sustain the objection to this offer;

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for it had only a remote, if any, relevance to the issue to be determined. The history of the efforts to secure the location of the agricultural school in the village of Hinckley would tend to confuse, rather than to aid, the jury in determining the question submitted to it.

The remaining assignments of error present the question whether the finding of the jury that the best interests of the territory to be affected thereby required the formation of the new district is so manifestly against the preponderance of the evidence as to justify the conclusion that the trial court, in the exercise of its discretion, ought to have granted the motion for a new trial. No question is here made as to the jurisdiction of the county board to hear and determine the petition, nor as to the regularity of the proceedings, culminating in the order establishing the new district. The contention is to the effect that the evidence and the facts which they tended to prove are undisputed, and that but one conclusion can be fairly drawn therefrom, namely, that the formation of the new district is against the best interests of the territory affected. There was but little conflict in the evidence tending to establish the evidentiary facts; but the controlling question is whether different minds might reasonably draw a different conclusion from them as to whether the formation of the new district would be against the best interests of the territory affected; that is, the people thereof. It will serve no practical purpose to burden the record with a statement of the evidence in detail. It is sufficient to indicate briefly the leading evidentiary facts which the evidence tends to establish.

Independent School District No. 2, in 1909, was designated by the state high school board as a proper one for an agricultural department, as provided by Laws 1909, p. 291, c. 247 [R. L. Supp. 1909, §§ 1342—15 to 1342—25]. It accepted the designation, purchased land, erected buildings and equipped them, employed trained instructors in agriculture and domestic science, and has ever since at the village of Hinckley, the seat of its government, successfully maintained and conducted one of the best agricultural and industrial schools in the state. Its entire educational system is open to all of

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school age, within the limits of the district. It has also built a schoolhouse and maintained a school in township 41, range 18. Its territorial limits originally included all of towns 41, 16, 17, 18, 19, 19½ sections of town 41—20, 9¼ sections of town 41—21. Since its organization, and before the formation of the district here in question, portions of its territory had been detached from it and annexed to three other districts, respectively, so that, excluding town 41, range 18, the territory of the new district, the territory of the appellant district now consists of fourteen sections in the north part of township 41, range 19, 19½ sections in township 41, range 20, and 9¼ sections in township 41, range 21. The assessed value of the territory of the proposed new district is $75,546, leaving the assessed value of the property of the appellant district only $220,000.

The distance from Hinckley to the territory of the new district is from eleven to seventeen miles, and the means of connection between them is primitive. Between them, there is a stretch of territory, some nine miles wide, which is practically unsettled. The number of persons of school age residing at present in the new district is limited; but it will increase in the near future, as its territory is being settled.

We have considered, not only the evidence, and evidentiary facts specially referred to, but the whole record, and have reached the conclusion that the verdict is justified by the evidence. In reaching this conclusion, we are not unmindful of the fact that the creation of the new district will materially reduce, for a time at least, the revenues of the appellant district which will probably impair its ability, to some extent, to maintain the high standard of its agricultural school. This, however, is not a controlling consideration; for the rights and interest of territory, remote from the seat of government of the appellant district, ought not to be sacrificed for revenue. Whether new districts shall be organized out of any portion of the territory of an independent district which maintains an agricultural school is a question for the legislature. The determination of the question of when and under what conditions school districts may be organized, or their boundaries changed, is purely a legislative one, which has been qualifiedly delegated to the respective boards of

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county commissioners of the state. The statute (R. L. 1905, § 1282), conferring such power upon county boards, makes no exception of independent districts; but, on the contrary, it expressly includes them.

It follows that the formation of the new district here in question out of a part of the territory of an independent district maintaining an agricultural school cannot be held to be contrary to public policy; for that which the statute authorizes cannot be legally against public policy. If the practical operation of the statute is a menace to the interests of rural agricultural schools, the remedy is by appeal to the legislature, not to the courts. County boards, however, cannot arbitrarily organize a new school district from a portion of the territory of an existing one, but only when the best interests of the territory affected require it. The statute [1] does not define the term, "the best interests of the territory;" but it is reasonably clear that it means the best interests of the people of the territory, as we say the best interests of the state, when we are speaking of the best interests of the people thereof. What is for the best interests of the people of a particular territory is a practical, not a legal, question, the solution of which involves a consideration of the interests of the whole territory. The interests of the most populous portion, or those of the sparsely settled and struggling portion, cannot be independently considered; for the interests of the strong can never be the measure of the rights of the weak. The ultimate question is: What do the best interests, present and future, of the people of the territory affected, considered as a whole, require?

We hold, upon a consideration of the whole record, that the verdict is not so manifestly against the preponderance of the evidence as to justify the conclusion that the trial court abused its discretion in denying a new trial.

Order affirmed.

[1] [R. L. 1905, § 1285]

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JOHN S. MILLMAN v. DRAKE & STRATTON COMPANY and Another.[1]

July 26, 1912.

Nos. 17,709—(203).

Verdict against both defendants sustained by evidence.

Evidence in an action by an employee of a mining company against such company and a coemployee of the plaintiff for injuries sustained by the plaintiff from being thrown from a "dinky" engine while firing the same *held* sufficient to sustain the finding of the jury, involved in their general verdict in favor of the plaintiff, that both of the defendants were guilty of negligence.

Questions for jury.

Whether, in such action, the plaintiff was guilty of contributory negligence or assumed the risk of the injury which he received, *held*, under the evidence, for the jury.

Charge to jury — refusal of request.

Where, in such action, the general instructions clearly, fully, and correctly stated the rules of law applicable to the facts proven, so far as the defendants were concerned, there was no error in the action of the trial court in refusing an instruction requested by the defendants as to what would not constitute negligence of the plaintiff's coemployee in running the engine, as engineer thereof, from which the plaintiff was thrown.

Same.

Such requested instruction *held* properly refused, as being inaccurate, ambiguous, and misleading.

New trial — false testimony.

The fact that a witness called by the plaintiff wilfully gave false testimony on the trial to the prejudice of the defendants' interests, and in favor of the plaintiff's claims upon the vital questions involved, did not require the granting of the defendants' motion for a new trial, where it did not appear that the plaintiff was in any way responsible for or implicated in the giving of such false testimony, except that he produced the witness, and where the trial court fully granted the defendants' request for instructions concerning such witness and his testimony, which testimony, furthermore, was known by the defendants on the trial to be false, and was contradicted by witnesses produced by the defendants for that purpose.

[1] Reported in 137 N. W. 300.

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Action in the district court for St. Louis county against Drake & Stratton Company and Vern Lovdahl to recover $40,000 for personal injuries. The complaint alleged that defendant company was negligent in maintaining its tail track in the condition stated, and both defendants were negligent in operating the train at an unsafe rate of speed, and in excess of the usual speed, at the point where the accident occurred. The case was tried before Hughes, J., and a jury which returned a verdict in favor of plaintiff for $14,940. From an order denying defendants' alternative motion for judgment notwithstanding the verdict or for a new trial, they appealed. Affirmed.

Spencer & Marshall, for appellants.

Samuel A. Anderson and *W. E. Whipple,* for respondent.

PHILIP E. BROWN, J.

Action to recover damages for personal injuries. The defendant the Drake & Stratton Company on May 19, 1910, and for a long time prior thereto, was engaged in removing earth from over a body of iron ore of the Dale-Uno mine, situated near Hibbing. Two steam shovels, each located on a separate track, were used to remove the overburden, and it was loaded into the usual dump cars, which were about fourteen feet in length. In the process of excavating a pit of considerable size and depth had been made, in the bottom of which the steam shovels were located and alongside of these were temporary dump car tracks. Two small narrow-gauge tram tracks ran in an easterly and westerly direction from the shovels, extending westerly out of the pit and merging into one track at a point where the first of the two switches hereinafter mentioned was located, some one hundred feet or more east of the second switch which led to what will be referred to as the tail track; the last switch mentioned being the one which lined up for the trains to pass from the tail track east to the dump track and to the dump. The tail track referred to was about four hundred fifty feet in length, and had been in use about one month. Six trains, of nine cars each and drawn by a single engine, were operated over these tracks on each shift.

Small engines, called "dinkies" and weighing about twenty tons each and equipped with steam jam brakes, were used to haul the

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trains out of the pit and to the dump. These engines had no tender, and the coal and water required for their use was carried, respectively, in a box attached to the side of the cab and on the top thereof in a saddle. The engineer sat on the right side and the rear of the cab, which the engineer and fireman both occupied, and the same was open and unprotected either by guard or railing to prevent them from falling from the rear end. The coupler on the rear of the engine was in the center, substantially on a level with the floor of the cab, and extended out about one foot, and there was a board about ten inches wide above the coupler, forming practically an extension of the cab floor. The coupling pin extended through this board over the coupler and through the coupler; the head of the pin being left extended about one inch above the board. The opening into the cab was in the rear, over the coupler, and the boiler head was directly in front of the opening, leaving a space in the cab back of the boiler head of about thirty inches. To fire the engine when in motion, it was necessary, while in the act of shoveling coal into the fire box, to stand with one foot on the cab floor against the boiler head and the other foot out on the board over the coupler and backed against the head of the coupling pin.

The track leading from the pit was first on an upgrade for some distance, then on a downgrade, and then on an upgrade which extended to the first switch. This space between the two switches, and also the tail track, was nearly level.

On May 19, 1910, the plaintiff was employed by the defendant company as a brakeman and fireman on one of the trains mentioned, and at the time in question was working on the night shift. He was thirty-eight years old, and had been employed by the said company in this class of work for several years. Between nine and ten o'clock in the evening of the day mentioned, the plaintiff was working on one of such defendant's trains in the said capacity, which was propelled by engine No. 114; such engine being in charge of the defendant Vern Lovdahl as engineer. The train had been loaded at one of the steam shovels, and the engine which was attached to the forward end of the train, head end to, started to back out towards the tail track, pulling the cars after it. While ascending the first grade after

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leaving the shovel the train stalled twice, and it became necessary to run forward toward the shovel in order to regain sufficient momentum to surmount the grade. On the third trial the train passed up and over this grade and the other portion of the track, descended past the two switches, and, when it reached a point some forty or fifty feet beyond the second switch and on the tail track, the plaintiff was either thrown or fell from the engine, and sustained serious injuries, for which he sought recovery in this action.

Before leaving the shovel, the engineer, Lovdahl, put coal into the fire box, and as the engine backed away from the shovel towards the first switch the plaintiff sat upon the coal box in the cab of the engine. All of the defendant's tracks were laid on the surface of the ground, without ballast, and the plaintiff was familiar with their construction and condition. The plaintiff claims, and offered evidence tending to show, that the engineer was angry after surmounting the first grade, and continued to run the train rapidly; that, when the engine came within about a car's length of the first switch, he, the plaintiff, got down, and put a scoop of coal into the fire box, standing, for this purpose, in the usual position when firing, and that he was temporarily blinded by the fire, so that he could not see and did not know when the engine ran over the second switch; that after it had passed this switch, and unknown to the plaintiff, while the engine was running ten miles an hour and when the plaintiff was about to throw another shovel full of coal upon the fire, the engine lurched and jumped up and down from one side to the other, twice as much as it had ever done before while he was thereon, and he was thrown out at the place above indicated.

There was also evidence tending to show that it was the custom and practice and his custom to fire on the way from the shovel to the tail track, and on the tail track and at any place and whenever fire was needed; that the train was operated over the grade on the said third trial and on the night mentioned at a speed of ten or twelve miles an hour, such being the usual rate of speed up to a point between the switches, but that it was customary to slow down the train between the two switches so as to pass over the last one and on to the tail track at no greater speed than four miles an hour; that the

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tail track was very rough, and that the track running from the shovel to the switch was in good shape; that there was no trouble in firing in the position which the plaintiff occupied, while coming out from the shovel to the switch, when running at a speed of ten miles an hour, and that he had frequently, and without difficulty, fired on the engine with the train moving on the tail track at a speed from three to four miles an hour, but that he had never fired on the tail track when the engine was running as fast as it was on the night in question; that at the point where he was thrown from the engine on the tail track there was a low place or sag in the track, so that, when the engine ran over this place, one side of the engine would drop down, thus making the track rougher and uneven, and that, in order to run over this place with reasonable safety, it was necessary to reduce the speed to three or four miles an hour; and that such was the customary rate of speed in passing over such place.

The plaintiff's ultimate claim is the same as that alleged in the complaint, namely, that the defendant company was negligent in maintaining its tail track in the condition stated, and that the defendants were negligent in operating the train described over the tail track where the accident occurred at an unsafe rate of speed and greatly in excess of the customary and usual rate at that point, and that the negligence of the defendants as stated constituted the proximate cause of the injuries complained of.

The defendants allege in their answer, maintained on the trial, and offered evidence tending to show that neither of them was negligent in the respects claimed by the plaintiff, or otherwise; that the track upon which the plaintiff was riding immediately prior to receiving the injury was the ordinary, usual, and customary track commonly used for such purposes and in the same condition as other tracks upon and about the said earth-stripping operation; that at the time the plaintiff was injured the engine upon which he was riding was the usual and customary engine used upon the said work, and with which the plaintiff was thoroughly familiar; that it was being operated at the usual and customary rate of speed over a track that was similar in all respects to other tracks upon the work, and the usual and customary track provided and used generally for such

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purposes; and also that the plaintiff's injuries were the result of his own carelessness, negligence, and lack of attention to his duties, or were the result of a risk or danger incident to the business in which he was engaged, all of which were open, known to, understood, and appreciated and voluntarily assumed by him.

The cause was tried to a jury, and the plaintiff had a verdict against both of the defendants; the jury also finding that the plaintiff's injury was caused by the negligence of the defendant Lovdahl. This is an appeal from an order denying the defendants' motion for judgment notwithstanding the verdict or for a new trial.

The court charged that, to entitle the plaintiff to a recovery, both grounds of negligence claimed by the plaintiff to have existed must in fact have existed at the time of the plaintiff's injury; that is, that there must have been a depression in the tail track due to negligence, and that the train, at the time in question, was run at a negligent rate of speed, and that if they so found, and also that the negligence of the defendants was the proximate cause of the plaintiff's injuries, the plaintiff should recover, unless he assumed the risks resulting in such injuries or was guilty of negligence proximately contributing thereto.

1. No direct claim was made here by the defendants that the evidence was insufficient to sustain the finding of the jury embraced in the general verdict returned, to the effect that both of the defendants were negligent as charged and within the instructions given by the court, and we are of the opinion, after an examination of the record, that such a contention could not be sustained.

2. The defendants urgently maintain that they were entitled to a directed verdict because it appeared that the plaintiff was guilty of contributory negligence, and also that the injuries he sustained were the result of the ordinary risks of the occupation, the dangers whereof were open, obvious, and familiar to him, and hence were assumed when he continued in the employment of the defendant company. The defendants had the burden of establishing these defenses on the trial, and to sustain either contention would require a holding that the facts upon which it depended were conclusively established by the evidence.

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As to the alleged contributory negligence, it is not feasible or necessary to discuss the evidence, which covers more than one thousand printed pages, at length. If the plaintiff's testimony was true, which was for the jury to determine in the first instance, then it fairly appears that he did nothing unusual shortly before the accident knowingly to jeopardize his safety, and omitted nothing in his work which it was usual or customary to do in the performance thereof with the appliances furnished him by the defendant company. On this issue it was proper to consider that he was justified in acting within reasonable limits on the assumption that the engineer would use his accustomed care in driving the engine. We hold that fair-minded men might reasonably draw a different conclusion in this regard from the proofs than the one deduced by the defendants, and, further, that the question was for the jury. We also reach the latter conclusion upon the question of assumption of risk.

3. The defendants assert, in support of their claim that the court erred in denying their motion for a new trial, that a witness called by the plaintiff wilfully gave false testimony upon the trial, to the great prejudice of the defendants' interests, and in favor of the plaintiff's claims concerning the vital questions involved. This point was presented to the trial court, upon the defendants' application for a new trial, solely upon the testimony given by this and other witnesses on the trial. No suggestion appears that the plaintiff was in any way responsible for or implicated in the giving of this testimony except in so far as the witness was produced by him. It appears that the defendants knew that this testimony was false when it was given, and witnesses were produced by them who contradicted it on the trial, and, further, that the defendants requested the court to instruct the jury particularly concerning this witness and his testimony, which request was fully complied with. We have no hesitation in disposing of this point adversely to the defendants, for the falsity of the testimony was so clearly established that no one possessed of half average intelligence could have been deceived thereby, and, further, for the reason that the trial judge, who had a much better opportunity to judge whether the jury were misled than we have, denied the defendants a new trial. In jury trials an occurrence

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of this kind would usually, if not always, militate against the interests of the party producing such a witness. The proposition that a party to an action calling a witness for examination in chief is responsible or vouches for his veracity is true to a very limited extent. Selover v. Bryant, 54 Minn. 434, 56 N. W. 58, 21 L.R.A. 418, 40 Am. St. 349.

The defendants finally complain because the court refused to give this one of their sixteen requested instructions: "If the jury find from the evidence that the plaintiff had not been accustomed prior to the time of the accident to put in a fire backing up or to be off his seat in the engine while they were backing up from the steam shovels, and that the engineer did not know that the plaintiff was doing anything out of the ordinary, at the time in question, it would not be negligent for the engineer to run the engine and train at any speed that would not cause any danger of derailment of the engine or cars." There was no error in refusing to give this instruction. The general instructions clearly, fully and correctly stated the rules of law applicable to the facts proven, so far as the defendants were concerned. This branch of the case is governed by the rule stated in Senro v. Chicago & N. W. Ry. Co. 115 Minn. 110, 131 N. W. 1011, as follows:

"The court is not required to instruct the jury as to the effect of particular items of evidence, or what conclusions may or may not follow therefrom * * * when the law of the case is fully stated in the general charge."

But, this aside, the instruction requested was inaccurate and ambiguous. Running an engine "at any speed that would not cause any danger of derailment" is not a proper test of ordinary care. Moreover, the jury might have inferred from the phrase "anything out of the ordinary," as used, that the court intended to convey the idea that the plaintiff was doing an improper act at the time indicated.

Order affirmed.

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STATE ex rel. SWAN ANDERSON and Others v. DISTRICT COURT OF KANDIYOHI COUNTY and Another.[1]

July 26, 1912.

Nos. 17,748—(254).

Uniform stage of water in lakes — proceedings valid.

In proceedings under the provisions of section 2552, et seq., R. L. 1905, for raising and maintaining the waters of Foot lake in Kandiyohi county, certain alleged irregularities are considered, and *held* not fatal to the validity of the proceedings.

Same — compensation to riparian owner.

The rights of riparian owners in land below the ordinary high-water mark are subject to the superior rights of the public; and, where a lake or other body of public water is raised to a point not beyond the ordinary high-water mark, under the authority of the statute referred to above, the riparian owner is not entitled to compensation.

Report sustained by evidence.

The report of the assessors in such proceedings, to the effect that no lands would be damaged by raising the lake, *held* sustained by the law and the evidence.

Writ of certiorari to review the order of the district court for Kandiyohi county, Powers, J., confirming the report of assessors appointed to assess damages and benefits caused by raising the waters of Foot lake to a uniform height. Writ discharged.

C. A. Fosnes and *Alfred K. Fosnes,* for relators.

George H. Otterness and *T. O. Gilbert,* for respondents.

Brown, J.

Certiorari to review the order of the district court of Kandiyohi county confirming the report of assessors appointed in proceedings under section 2552, et seq., R. L. 1905, to raise and maintain the waters of Foot lake at a fixed and uniform height.

It appears from the record that Foot lake is a large navigable

[1] Reported in 137 N. W. 298.

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body of water, wholly within Kandiyohi county, covering an area of about fifteen hundred acres, and partly within the corporate limits of the city of Willmar, a city of forty-five hundred population. For many years the waters of the lake have gradually receded, either from natural causes or the lowering of the outlet thereof, and the level of the water therein was, at the time the proceedings were commenced, far below the ordinary high-water mark.

On November 25, 1910, the board of county commissioners, acting upon its own motion and under and pursuant to the provisions of the statute above cited, adopted a resolution providing for raising the lake to its normal level and height. The resolution recites the condition of the lake, many pertinent facts, and, further, that the interests of navigation and public health require a restoration of the lake to its former condition. The particular height to which the board deemed necessary to raise the lake was set forth in the resolution, and was based upon conditions existing in April, 1910, and is below the ordinary high-water mark. The resolution also provided for the erection of a dam at the outlet of the lake, for the purpose of maintaining the water at the level intended; and, further, that it would not be necessary to acquire any land by condemnation or otherwise for the completion of the project, the entire cost of which, the board determined, would amount to $800. The action of the board was taken after due deliberation and a full investigation and consideration of the rights and interests of the public, as well as riparian property owners.

A certified copy of the resolution was filed with the clerk of the district court, and application thereafter made to the court, as provided for by section 2554, for the appointment of assessors for the assessment of damages and benefits. Due notice of the application was given, as required by the statute, and upon the hearing thereof assessors were duly appointed by the court. One assessor so named subsequently resigned, and another was appointed in his place. The assessors duly qualified and entered upon the discharge of their duties. Hearings were had before them, and all persons interested appeared and offered evidence in support of or in opposition to the proposed work, as well as upon the question of dam-

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ages or benefits. These assessors subsequently made written report to the court of the result of their consideration of the evidence presented. They found that the proposed improvement was necessary for the purposes of navigation and for the promotion of the public health; that the proposed raise of the waters of the lake would not extend beyond the ordinary high-water mark; that no land adjacent to the lake would be damaged thereby or benefited therefrom; and that the cost of the improvement should be borne by the county. The court, after due notice and hearing, made its order confirming the report; whereupon relators, riparian owners, sued out the writ by which the proceedings are brought here for review.

The points made by relators in support of the contention that the proceedings below should be set aside may be stated under two general propositions: (1) That certain alleged failures to comply with the statute deprived the county board and the court below of jurisdiction; (2) that the assessors, in reporting to the court that no property would be damaged by the proposed improvement, proceeded under a misapprehension of the evidence, upon erroneous principles of law and obvious mistake of fact.

The alleged defects in the proceedings do not require extended mention. It is insisted that the first step, in the orderly course of procedure under the statute, is the institution of proceedings to condemn land necessary to carry out the purposes of the project, and that, since no such proceedings were commenced in the case at bar, the board was without jurisdiction. The contention is not sustained. While section 2552 provides for and authorizes condemnation proceedings for the purposes stated, it is clear that the commencement thereof, when no land is to be acquired, is wholly unnecessary. No purpose could be subserved by the proceeding, and to conduct it would be a meaningless ceremony. It is probable that in cases where land must be acquired by condemnation, proceedings for that purpose would necessarily precede any definite action by the board looking to final action ordering the improvement; for the cost and expense incident to the work must be "ascertained with reasonable certainty" and reported to the court on the application for the appointment of assessors. But, where the acquisition of land is wholly

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unnecessary, the situation is entirely different. In the case at bar, the county board fully investigated the matter and determined in advance that no land was necessary to be taken or condemned, and so reported to the court in and by the resolution ordering and declaring the propriety of the improvement.

For the same reason, there was no fatal error in the failure of the court more specifically to specify the "maximum sum which may be assessed upon benefited lands," as required by section 2554. The order of the court was "that in case any lands are benefited by the raising and maintaining of the waters of said Foot lake, the assessors shall then assess such benefited lands * * * not [to] exceed the rate of $150 for each acre thus benefited." If there be any error in the order so made, it is wholly without prejudice, for the reason that no lands were to be assessed for benefits at all. The commissioners so determined, and the assessors so reported to the court.

If we correctly understand counsel's further contention, it is that, since there were no lands benefited and which could be assessed to defray the cost and expense of the improvement, the proceedings are void. In other words, that an improvement of this character cannot be made, unless the cost and expense thereof may be defrayed by assessments upon benefited property. This contention is answered, it would seem, by section 2558, wherein it is provided that so much of the cost of making the improvement as is not paid by assessment shall be paid by the county. Since no part of the expense was raised by assessments, the whole thereof falls upon the county.

2. The further contention that the report of the assessors should be set aside as not justified by the evidence is not sustained. Section 2556 provides that the court, upon the application for confirmation of the report of the assessors, shall consider all objections thereto; "but objections to the amount assessed shall be disregarded, unless it be made to appear that in fixing such amount the assessors were governed by improper motives, or acted upon erroneous principles, or under obvious mistake as to the facts."

Our examination of the record will not permit the conclusion required by the statute as the basis for interference with the assess-

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ment made. State v. District Court of Hennepin County, 83 Minn. 464, 86 N. W. 455. There is no suggestion that the assessors were governed by improper motives; but it is claimed that the riparian rights of the relators were entirely ignored in the conclusion that they would suffer no damage by raising the lake. The claim is that certain rights of accretion and reliction became attached to the lands of relators by the gradual recession of the water of the lake, of which they cannot be deprived without compensation. The rights of riparian owners in this respect were fully considered by the court in Carpenter v. Board of Commrs. of Hennepin County, 56 Minn. 513, 58 N. W. 295, where it was held that riparian rights below the ordinary mark of high water were subject to the superior right of the public, and that a taking thereof by the authorities for a public use, as by raising the waters of a lake for purposes of navigation or the public health, was a damage for which no recovery could be had. The same rule was followed and applied in Stenberg v. County of Blue Earth, 112 Minn. 117, 127 N. W. 496, and other cases. 3 Notes to Minn. Cases, 1117.

It is probably true that, by the reason of the recession of the water of the lake in years gone by, shore land has been exposed and made suitable for agricultural purposes. But all thereof within the ordinary high-water mark is subject to reclamation by the public for the interests of the general welfare, and the rights of the riparian owner must yield to that right. The assessors acted upon this theory, and rightly so. Nor can the riparian owners claim the same by adverse possession, as suggested by counsel. Chapter 65, p. 65, Laws 1899; R. L. 1905, § 4072; Murtaugh v. Chicago, M. & St. P. Ry. Co. 102 Minn. 52, 112 N. W. 860, 120 Am. St. 609; City of Hastings v. Gillitt, 85 Minn. 331, 88 N. W. 987. It is not claimed that any rights by adverse possession accrued prior to the passage, in 1899, of chapter 65, supra, by which the rule theretofore followed, as respects the application of statutes of limitation against the public, was abrogated.

This covers all questions necessary to be considered, and results in the conclusion that the proceedings below were in conformity with the law and must be sustained.

Writ discharged.

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E. R. KRASSIN v. CITY OF WASECA.[1]

July 26, 1912.

Nos. 17,769—(257).

Ballot — intention of voter.

In a city election to determine whether license to sell intoxicating liquors shall be granted, ballots on which the voters had written the word "No" opposite the words "In Favor of License," instead of putting a cross opposite the words "Against License," sufficiently express the intention to vote against license, and were properly counted as votes against license.

E. R. Krassin, a taxpayer, appealed to the district court for Waseca county from the decision of the city council of Waseca, acting as a canvassing board, that at the city election in April, 1912, the vote was in favor of granting retail licenses for the sale of intoxicating liquor. The appeal was heard by Quinn, J., acting for the judge of the Fifth judicial district, who made findings of fact and reversed the decision of the canvassing board. From the judgment entered pursuant to the order for judgment, the city of Waseca appealed. Affirmed.

P. McGovern, for appellant.

Morgan & Meighen, for respondent.

Bunn, J.

Waseca is a city of the fourth class, governed by a home rule charter. At a general election held April 2, 1912, the question of granting license for the sale of intoxicating liquors was voted upon. The charter provides that the "question of license shall be determined by ballots containing the words 'In Favor of License' or 'Against License,' as the case may be * * * and if such returns show that a majority of the votes cast at such election shall be against license then the common council shall not grant any license for the sale of such liquors in said city during the ensuing year." [c. 5, § 5] Six

[1] Reported in 137 N. W. 191.

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hundred and ninety-eight ballots were cast at the election. The common council, after canvassing the votes, returned and announced that 338 votes were cast in favor of license and 349 votes, or one less than a majority, against license. The contestant, a taxpayer, appealed to the district court, where it was determined and adjudged that 351 votes, or a majority of all the votes cast, were against license, and that the decision of the canvassing board appealed from be reversed. From this judgment the city appealed to this court.

On the argument it was conceded that, if the two ballots marked as Exhibits 4 and 5 were properly counted as votes against license, the judgment ought to be affirmed. These ballots were identical and were as follows:

CITY BALLOT—FIRST WARD		
Put a cross "X" opposite the measure you wish to vote for in the squares indicated by the arrow.	▼	
In Favor of License	No.	Vote for one
Against License		

That is, instead of putting a cross opposite "Against License," the voter wrote "No" opposite "In Favor of License." We find no difficulty in deciding that this was a clear expression of the intention to vote against license. The charter does not say how this intention of the voter shall be evidenced, and we hardly see how it could be shown more emphatically.

Judgment affirmed.

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BERTHA LONGBOTHAM v. THOMAS B. LONGBOTHAM.[1]

August 2, 1912.

Nos. 17,716—(208).

Divorce — defense of insanity — alimony.

Appeal from a judgment granting the plaintiff an absolute divorce on the ground of defendant's cruel and inhuman treatment of her. *Held:*

1. The trial court did not abuse its discretion in denying defendant's application to amend his answer on the trial.

2. Insanity is a defense to an action for a divorce on the ground of cruel and inhuman treatment, if at the time the alleged acts of cruelty were committed the defendant was laboring under such a defect of reason as not to know the nature of his acts or that they were wrong. The evidence is not sufficient to bring this case within this rule.

3. The district court is authorized to award to the wife as permanent alimony a gross sum and make it a lien on the husband's real estate, or to give her specific part of his real and personal property, or an undivided part or interest in the whole thereof, as may be found for the best interests of the wife under the circumstances of each case.

4. The findings of fact are justified by the evidence, and they support the conclusions of law and the judgment.

Action in the district court for Ramsey county for an absolute divorce and suitable support for plaintiff and the minor children. The case was tried before Dickson, J., who made findings and conclusions of law as stated in the opinion. From the judgment entered pursuant to the findings, defendant appealed. Affirmed, without prejudice to the right of defendant, if so advised, to apply to the trial court for a modification thereof as to the lien on his personal property.

Schmidt & Waters and *L. O. Rue,* for appellant.

Edward C. Stringer, McNeil V. Seymour and *Edward S. Stringer,* for respondent.

[1] Reported in 137 N. W. 387.

Note.—As to validity of provision in decree for alimony declaring a lien on husband's personalty, see note in 30 L.R.A.(N.S.) 1062.

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START, C. J.

Appeal by the defendant from a judgment of the district court of the county of Ramsey, granting the plaintiff an absolute divorce on the ground of his cruel and inhuman treatment. The complaint alleged that the defendant during the times alleged therein falsely and persistently charged the plaintiff with infidelity and illicit intimacy with another man; that such charges were without any foundation whatever, and were made not only to the plaintiff, but to her sons, neighbors, and others; that on several occasions he threatened to kill her, and did choke and beat her; and, further, that such conduct of the defendant has seriously impaired her health.

These allegations of the complaint were denied by the answer, which alleged, as a counterclaim or cross-bill, that the plaintiff was guilty of cruel and inhuman treatment of the defendant and had deserted him; that to deprive him of his property and to get possession thereof she, well knowing that he "was not insane, is not insane now, and never was insane," charged him with being insane, and by the perjured testimony of herself and children caused him to be committed to the hospital for the insane at St. Peter.

The reply denied the allegations of the cross-bill and alleged that the defendant in 1909 was duly adjudged insane by the probate court and committed to the asylum for treatment.

On the trial of the cause, and after the plaintiff had rested her case, the defendant offered in evidence the records of the probate court showing that the defendant was committed to the hospital for the insane for treatment. The plaintiff objected to the evidence as a defense to any acts of the defendant on the ground of insanity, for the reason that it was not pleaded, but no objection to the evidence was made if it was offered as tending to prove the allegations of the cross-bill. The objection was sustained. The defendant then asked leave to amend his answer so as to plead insanity as a defense to any alleged acts of cruelty committed prior to his commitment to the hospital. The plaintiff objected to the proposed amendment on the ground that it tendered entirely new issues. The court denied the application, and the defendant excepted to the ruling. The defendant then introduced the records of the probate court, to support the

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allegations of his cross-bill, which showed that the defendant was adjudged insane and committed to the hospital September 29, 1909, paroled January 21, 1910, and discharged April 5, 1910; that he was again adjudged insane on July 22, 1910, but, a bond having been given for his safe-keeping, he was not sent to the hospital; and, further, that he was restored to capacity by the order of the probate court on December 14, 1910. He verified his answer herein on September 11, 1911.

The trial court, upon a consideration of all the evidence, found as facts that the defendant was guilty of the several acts of cruel and inhuman treatment alleged in the complaint; that such conduct seriously impaired her health and endangered her life; that the plaintiff owned a lot in Merriam Park, which, with the house thereon, was the homestead of the parties; that he claimed to be the owner of the furniture therein; that he claimed to be the equitable owner of two hundred forty acres of land in the county of Grant, this state, the record title of which was in the name of one of his sons; that he was a traveling salesman capable of earning from $100 to $125 per month; and, further, that he was an improper person to have the custody of a son of the parties, who was fourteen years old.

The court, as conclusions of law, directed judgment in favor of the plaintiff granting her an absolute divorce, awarding her as permanent alimony an undivided one-third of the homestead and of any other real estate in the state of Minnesota belonging to the defendant, also one-third of any personal property in the house which is a part of the homestead belonging to him, and further awarding the care and custody of the minor son to the plaintiff, and requiring the defendant to pay to her $30 each month for the support of the son, and making it a specific lien on any personal property of the defendant situated in the homestead and on any interest he may have in the land in Grant county. Judgment was so entered.

1. The first contention of the defendant is that the trial court erred in denying his application, made on the trial, to amend his answer. The amendments of pleadings is a matter resting in the discretion of the trial court, and its action will not be reversed except for a clear abuse thereof. We are of the opinion that the trial judge

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did not abuse his discretion in this case, but, on the contrary, that he fairly exercised it, in view of the circumstances disclosed by the record. The answer was made nine months after the defendant was restored to capacity. No claim was or is made of any mistake or misunderstanding as to the allegations of the answer or the legal effect thereof, nor was any reason shown which would justify an amendment, on the trial, which was an abandonment of the issues tendered by the original answer and the substitution of entirely new ones. It is true, as defendant claims, that the reply alleged that the defendant had been adjudged insane and committed to the hospital for treatment; but this was defensive matter in reply to the charge in the answer that the plaintiff, well knowing that he was sane, had by perjury caused him to be committed to the hospital. If the original answer had alleged insanity as a defense to the acts of cruelty charged in the complaint, the plaintiff would then have had ample time for investigation and preparation to meet the issue tendered, which she could not do if tendered for the first time on the trial.

2. The defendant also urges that the findings of fact of the trial court are not sustained by the evidence, and that the facts found do not sustain its conclusions of law. The principal contention in this connection is to the effect that it is practically conclusive from the record that the several alleged acts of cruelty charged against him were, if committed, the result of his insanity. The record shows that no such issue was tendered by the answer or tried by the court. The proceedings whereby the defendant was committed to the hospital for the insane were received in evidence, after motion to amend the answer was denied, only as tending to support the allegations of the defendant's cross-bill; but, were it otherwise, there was no evidence which would sustain the defense of insanity to the charges made against him in the complaint. Insanity is a defense to an action for a divorce on the ground of cruel and inhuman treatment, if at the time the alleged acts of cruelty were committed the defendant was laboring under such a defect of reason as not to know the nature of his acts or that they were wrong. R. L. 1905, § 4756. The fact that the defendant had been adjudged insane and committed to the hospital for treatment does not necessarily establish that

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he was insane, within the rule stated, when the several acts of cruelty were committed. See Knox v. Haug, 48 Minn. 58, 50 N. W. 934. This being a divorce action, we have considered the evidence relative to the defendant's insanity when the acts of cruelty were committed, although there was no issue as to the matter, and find that it is not sufficient to require or sustain a finding that the defendant was insane. We accordingly hold that the findings of fact are sustained by the evidence, and that they sustain the conclusion of law and judgment that the plaintiff was entitled to an absolute divorce. The evidence was not sufficient to require a finding that the plaintiff deserted the defendant.

3. The only other question presented by the assignments meriting special consideration is whether the facts found sustain the judgment as to the award of alimony. The specific objection is that the court was not authorized to award the wife as permanent alimony an undivided interest in the real estate of her husband, but that its value should have been ascertained and not exceeding one-third thereof assigned to the plaintiff.

The statute (R. L. 1905, § 3590) provides that the court may order and decree to the wife "such part of the personal and real estate of the husband, not exceeding in value one-third thereof, as it deems just and reasonable, having regard to the ability of the husband, the character and situation of the parties and all other circumstances of the case." The word "part" is used in this statute in its broadest sense and as the equivalent of share or portion. We so construe the statute, and hold that it authorizes the court to award to the wife as permanent alimony a gross sum, or a specific part of the husband's real and personal property in severalty, or an undivided part of the whole thereof, not exceeding in value one-third of his property, as the court may find to be for the best interests of the wife under the circumstances of each particular case. Mahoney v. Mahoney, 59 Minn. 347, 61 N. W. 334. The court, however, should award to the wife an undivided part of the husband's property with caution, for the tendency of such an award is to excite strife and litigation between the divorced parties. The uncertainty of the interest of the defendant in a portion of his real estate justifies the award of an

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undivided interest in this case. We find no error in the award in this respect and hold that it is sustained by the findings of fact.

The last assignment of error to be considered is that the trial court had no authority to make the allowance for the support of the minor son a lien on the personal property. This must be conceded. The authority of the court to make its decree for alimony or allowances a lien on the property of the husband is purely statutory (14 Cyc. 783), and our statute (R. L. 1905, § 3590) limits, by necessary implication, the right to real estate; but the court may provide for execution against both real and personal property to enforce payment of the amount awarded. Conklin v. Conklin, 93 Minn. 188, 101 N. W. 70. The question, however, seems to be one of no particular importance in this case, as it does not appear from the record that the defendant is prejudiced by the decree in this respect. The finding of the court is not that he owns any personal property, but simply that he claims to be the owner of certain household furniture. In any event, we are of the opinion that the action of the trial court is not such prejudicial error as to require a reversal of the judgment, as the defendant, if aggrieved by this part of the judgment, may have leave to apply to the trial court for a correction thereof.

The findings of fact herein are justified by the evidence and they sustain the conclusions of law and judgment.

It follows that the judgment must be affirmed, without prejudice to the right of the defendant, if so advised, to apply to the trial court for a modification thereof as to the lien on his personal property. So ordered. No statutory costs allowed.

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GEORGE HIGGINS and Another v. W. C. LACROIX and Others.[1]

August 9, 1912.

Nos. 17,761—(191).

Village ordinance — evidence inadmissible.

For the purpose of determining the validity of a general ordinance relating to the good order and government of a village, it is error to receive in evidence admissions by individuals of the village council that the motive in enacting the ordinance was to accomplish a nonpermissible or unlawful end.

License fee — evidence of reasonableness.

In determining whether a license fee of $200 per annum for a permanent moving picture show is unreasonable, evidence may properly be received as to the character and number of the inhabitants of the village, its situation, the general character of the exhibitions of the kind in question in similar villages, the crowds attracted, and the need of police surveillance; but *held*, that in this case it was error to receive evidence of the kind of exhibitions carried on by these plaintiffs, and to consider the good quality thereof as controlling on the question of the reasonableness of this, a general ordinance, fixing a license fee for all who might conduct moving picture shows in the village.

License fee not excessive.

The license fee mentioned for a permanent moving picture show in a village of one thousand inhabitants is *held* not so excessive as to clearly manifest either a purpose to tax or prohibit under the guise of license; such business being one which is liable to degenerate, is likely to require considerable police surveillance, and which is of a kind wherein regulation and restraint may be imposed in the amount of the license fee itself.

Injunction.

Injunction is not the appropriate remedy available to a village in case of violations of its general ordinances.

Action in the district court for Itasca county against W. C. Lacroix, as president, and others as members, of the village council of Deer River, and others, for a permanent injunction to restrain defendants,

[1] Reported in 137 N. W. 417.

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their officers and agents, from interfering with plaintiffs in the conduct of their business of operating a motion picture theater, or from destroying their business.

The complaint, among other matters, alleged that defendants had interfered with their business and threatened to compel plaintiffs to discontinue it, and defendant police officer had been instructed to order plaintiffs to close the doors of their theater and discontinue the business. The answer alleged the existence of a village ordinance, prohibiting the carrying on of a business or occupation of the nature of that of plaintiffs without having a license so to do; alleged that plaintiffs had wholly failed, refused and neglected to obtain or apply for a license, but notwithstanding had ever since December 28, 1910, carried on their business in violation of the provisions of the ordinance; that in their official capacity defendants had caused plaintiffs to be arrested and instructed the village marshal to close plaintiffs' place of business until they should comply with the ordinance. The reply, inter alia, alleged that the ordinance was unreasonable as applied to the business of plaintiffs.

The case was tried before Stanton, J., who made the findings stated in the opinion and as conclusions of law found that the license fee attempted to be imposed was unreasonable, excessive and prohibitive, and that it was adopted for the purpose of revenue; that the ordinance was invalid, and that plaintiffs were entitled to the relief prayed for. From the judgment entered pursuant to the findings, defendants appealed. Reversed with directions to dismiss the action on the merits.

Thwing & Rossman, for appellants.

Spear & Stone, for respondents.

HOLT, J.

At the suit of plaintiffs the court enjoined the defendants, as officers of the village of Deer River, from prosecuting plaintiffs for conducting a moving picture show without a license in the village. The defendants appealed from the judgment.

Under the statute empowering village councils "to prevent or license and regulate the exhibition of circuses, theatrical perform-

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ances, or shows of any kind," the village council of Deer River, a village of about one thousand inhabitants, duly passed an ordinance fixing a license fee of $200 per annum for "every permanent theater, theater comique, vaudeville theater, electric theater, variety show, moving picture show, or other show of similar nature." The fee prior thereto had been $20 per annum. Plaintiffs are the owners of a leasehold in a building in the village wherein they conduct a permanent picture show. Although they applied for a license, they refuse to pay the fee fixed by the ordinance. For running the show without a license plaintiffs have been subjected to unsuccessful criminal prosecutions, and these defendants threaten to continue to prosecute them. The prosecutions have affected plaintiffs' business injuriously and interfere with their enjoyment of the leasehold mentioned. The court also found that plaintiffs always conducted the picture show in a quiet, orderly, and inoffensive way, and that it has always been of a clean, moral, and instructive nature, and that no disturbance or disorder of any kind has ever occurred; that the expenses of conducting the show, including therein a fair living for the one who runs it, equal the receipts; that it could not be carried on if the license fee fixed is exacted; and the ordinance was held unreasonable, excessive, prohibitive, adopted for revenue, and invalid. In the answer defendants, in addition to a denial of the invalidity of the ordinance, attempted to set up a counteraction asking that plaintiffs be enjoined from operating their show until they paid for and obtained a license. The court sustained plaintiffs' demurrer to defendants' cause of action.

The errors assigned may be considered under three heads: (a) Rulings on the admission of evidence; (b) the validity or invalidity of the ordinance; and (c) the ruling on the demurrer to defendants' attempted cause of action.

Against the objections of defendants, testimony was received of admissions by individual members of the village council tending to show that their motive in fixing the license fee was to obtain funds for a depleted village treasury. The findings clearly indicate that this evidence, in a large measure, influenced the conclusions of the learned trial court against the validity of the ordinance. We think

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evidence of the motives of the individual members of the village council in passing the ordinance was erroneously received. Legislative acts would rest on insecure ground, indeed, if admissions of the individual legislators that the attainment of a nonpermissible or unlawful end was the motive and purpose in enacting a law are to be received in evidence and be considered by the courts when called to pass on their validity. Discussions of lawmaking bodies when considering and enacting a law may, when the language is obscure and doubtful, be considered by the courts for the purpose of arriving at the true intent and meaning of the act, but manifestly it ought to be beyond the power of one who has been intrusted with authority to enact a law to impeach the same by any subsequent statement of secret or avowed motives entertained at the time of its passage that would work its invalidity. 28 Cyc. 375, 376.

In Soon Hing v. Crowley, 113 U. S. 703, 710, 5 Sup. Ct. 730, 28 L. ed. 1145, it is said:

"The rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation considered with reference to the condition of the country and existing legislation." An exception to this general rule may be found where an act or ordinance relates to a private contract and was passed to defraud. We conceive that the general rule just stated applies to ordinances of a municipality when they relate solely to the good order and government of the same. State v. City of Lake City, 25 Minn. 404.

We are also of opinion that it was error to receive evidence as to the manner in which these plaintiffs carried on their business, and to let that influence the conclusion upon the validity of the ordinance. On the issue of the reasonableness of the ordinance it was proper to receive evidence as to the number and character of the inhabitants, floating population, and frequenters of the village; as to crowds attracted to amusements that come under the general designation of picture shows, the policing of the same, the kind of exhibition usually staged at moving picture shows in villages situated and made

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up of a population similar to this village. For this ordinance is general in its application and was not enacted specially for these plaintiffs. It can therefore be of no consequence how they conduct their show, or with what result to themselves. Because the pictures heretofore shown by them have been clean, moral, and instructive, there is no assurance that they will continue so to be. Others may open moving picture shows in the village of a tone different from plaintiffs' and may meet with better pecuniary result.

The main question is the validity of the ordinance, for, even if the evidence above referred to was erroneously received and given effect in the decision, still the judgment is right if the ordinance be invalid. The ordinance is a general enactment covering a number of licensed occupations. However, separate license fees are fixed for the different pursuits, so that the ordinance may be unreasonable as to the fee fixed for one business and proper and valid as to that fixed for another. Therefore the license fee fixed for auctioneers, peddlers, bowling alleys, etc., need not be considered because it can have no bearing on the reasonableness of the license fee here involved. The sole attack is that the license fee of $200 per annum is excessive and a tax upon a business such as a permanent moving picture show in a village the size of Deer River.

Certain propositions are established by decisions of this court which seem to indicate and control the proper determination of the status of this ordinance. A village council may fix a fee for a licensed calling or business which shall include the necessary cost of issuing the license, and the reasonable expense of supervision and police control over the conduct of the calling or business licensed. It has no right to exact or levy a tax under the guise of a license. However, in fixing the license fee the municipality is accorded a wide discretion. Courts are not to usurp the functions of village or city authorities in the matter. Unless the amount is so manifestly unreasonable that there is no escape from the conviction that the power given has been abused or exceeded in fixing a license fee, is the court authorized to declare the ordinance illegal. A vocation or business may of itself be such that a license fee sufficiently large to act as a restraint or regulation is properly imposed.

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"In respect to exhibitions, amusements, etc., a larger discretion on the part of the municipal corporation is recognized than in the case of trades and useful occupations, and the rule has, of course, a still broader application where the business is such as is liable to degenerate into a nuisance, or such as tends to promote disorder or crime," is stated in City of Mankato v. Fowler, 32 Minn. 364, 20 N. W. 361.

In City of Duluth v. Krupp, 46 Minn. 435, 49 N. W. 235, it is held that, where an occupation "is liable to become a public nuisance if not restrained, it is a legitimate exercise of the police power to impose a license fee large enough to act as a restraint upon the number of persons who might otherwise engage in it, even although the sum exacted is greater than the expense of issuing the license and of police supervision of the business."

Mr. Justice Mitchell, in upholding a theater license fee of $125 for six months in City of Duluth v. Marsh, 71 Minn. 248, 249, 73 N. W. 962, uses this language: "In respect to theatrical exhibitions and amusements of similar character, a larger discretion on part of municipalities is recognized than in the case of ordinary trades and occupations, both because they are liable to degenerate into nuisances, and also because they require more police surveillance, and police service."

Moving picture shows are of comparatively recent origin but of rapid growth, springing up everywhere in the large cities and invading even villages and towns of modest size. While, as generally conducted, some educational value may be conceded to exist in these shows, it is nevertheless true that the chief aim is to furnish the sort of entertainment that will draw the most dimes. To furnish people with innocent and cheap amusement is laudable, but experience teaches that, where amusements are furnished for pecuniary profit, the tendency is to furnish that which will attract the greatest number rather than that which instructs or elevates. To say the least, opinions are quite at variance as to the merits of moving picture shows as an influence for good or evil in a community. It must therefore be classed among those pursuits which are liable to degenerate and menace the good order and morals of the people, and may therefore

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not only be licensed and regulated, but also prevented by a village council. Section 727, subd. 12, R. L. 1905. Common observation reveals the fact that crowds attend these picture shows afternoons and evenings every day in the week. In or about the entrance of the show place in the small village is undoubtedly the rendezvous of the young and thoughtless, as well as the vicious. Police surveillance is likely to become a necessity because of this. In the light of all the facts connected with moving picture shows, the possibilities therein to degenerate and require policing, we are of opinion that, under the principles announced in the decisions above cited, the license fee fixed by the village council of Deer River is not so unreasonably high as to manifestly show an abuse of power or any unlawful purpose or result.

We cannot agree to the contention that the ordinance is a prohibition under the guise of license and regulation. The village is presumably a growing community, now having more than one thousand inhabitants. These shows are usually carried on every day in the week with several performances each day. Fifty-five cents per day does not appeal to us to be so high that it necessarily results in prohibiting moving picture shows from locating in Deer River. Moreover, the fact that plaintiffs have failed to make any particular profit out of the venture does not prove that others may not be able to make a success thereof. We therefore consider the trial court wrong in holding the ordinance invalid.

Defendants also claim that the court erred in sustaining the demurrer to that part of the answer wherein an attempt is made to set out a cause of action for an injunction against plaintiffs' conducting their business without first obtaining the license required. Plaintiffs' right to equitable relief, even were the ordinance void, may not be free from doubt; but, since that objection has not been pressed by appellants, we have considered plaintiffs' cause of action on its merits. However, we are clear that defendants have no right on the facts pleaded to an injunction. The claim is that the two village justices before whom alone prosecutions against plaintiffs for violation of the ordinance can be instituted have declared the ordinance void, and defendants have no adequate remedy at law. It is not to be pre-

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sumed that hereafter they will so hold. Moreover, criminal statutes and ordinances cannot be enforced by injunction. If that were permissible, the constitutional guaranty of trial by jury would be of little avail in many cases. It has never been contemplated that, if justices of the peace or trial courts should take an erroneous view of the validity of a criminal law or ordinance, this entitles the state or the municipality to come into a court of equity for relief. Were such a rule adopted, the result would plainly be confusion in the established practice without any compensating advantage in the furtherance of justice.

Our conclusion is that the judgment must be reversed, with directions to the trial court to dismiss the action on the merits.

So ordered.

STATE ex rel. JOHN A. NORDIN v. AL. P. ERICKSON.[1]

August 9, 1912.

No. 17,785.[2]

Primary election act — classifying candidates — validity.

This appeal involves the validity of the provisions of the primary election statute of 1912 for classifying candidates on the primary ballot, when two or more persons are to be elected for the same office. *Held:*

1. Whatever the people have not, by their Constitution, incapacitated themselves from doing, they may do by their representatives in the legislature, unless it be an act forbidden by the Federal Constitution, and the provisions of the statute are valid unless they are so clearly repugnant to the Constitution as to leave no fair doubt as to their invalidity.

[1] Reported in 137 N. W. 385.

[2] Special session of the court.

Note.—As to constitutionality of primary election laws generally, see note in 22 L.R.A.(N.S.) 1136.

As to whether "primary elections" are elections, within Constitution or statute relating to elections generally, see note in 18 L.R.A.(N.S.) 412.

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2. Our Constitution guarantees the right of a qualified elector to vote at any election, defines the qualifications of an elector, and the conditions of eligibility to office, which cannot be changed or added to by statute.

3. The legislature may make and impose such reasonable regulations which it deems necessary to secure a pure and orderly election and to guard against unfair combinations, undue influence, and coercion, although they may incidentally affect the right of an elector to vote or his opportunities for securing an election to office; but they must be reasonable, uniform, and impartial, and must not be such as to defeat indirectly the constitutional rights of an elector or unnecessarily obstruct the exercise thereof.

4. A primary election, which is purely of statutory origin, is the selection, by qualified voters, of candidates for the respective offices to be filled; but an election, which has its origin in the Constitution, is the selection by such voters of officers to discharge the duties of such offices. Statutory regulations applicable only to primary elections, which might be repugnant to the Constitution if extended to elections, are not necessarily invalid unless they are so onerous, unfair, or obstructive as practically to defeat the fair right of an elector to vote or to be elected to office.

5. The provisions, as to classifying of candidates, have not been extended to official election ballots, for they begin and end with the primary election statute.

6. The provisions of the primary election statute of 1912, as to classifying of candidates, are not repugnant to the guaranties of the Constitution as to the right to vote and eligibility to office, and the statute in this respect is not unconstitutional.

On the relation of John A. Nordin, a qualified voter of the city of Minneapolis, the district court for Hennepin county issued its alternative writ of mandamus directing respondent, as county auditor, to accept and file petitioner's affidavit of candidacy for the office of member of the legislature for the Forty-second legislative district, and that petitioner's name be placed upon the ballot at the primary election as candidate for such office without designation of class, or show cause why he had not done so. Relator interposed a general demurrer to the answer and return. The demurrer was overruled and the writ quashed, Hale, J. From the judgment quashing the writ relator appealed. Affirmed.

John A. Nordin, pro se.

Lyndon A. Smith, Attorney General, *Alexander L. Janes,* As-

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sistant Attorney General, and *James Robertson,* County Attorney, for respondent.

START, C. J.

The relator resides in and is a qualified voter of the Forty-second legislative district, which is entitled to elect at large two members of the House of Representatives. Desiring to have his name placed on the primary election ballot as a candidate for representative from his district, he presented his affidavit to the respondent as county auditor, which was sufficient in form and substance to authorize the placing of his name on such ballot, except that it did not designate the class and number in which he desired to file and become a candidate, as provided by Laws 1912, p. 4, c. 2, § 2. The respondent refused to accept and file the affidavit for the sole reason that it did not so designate the class and number. Thereupon, on the petition of the relator, an alternative writ of mandamus issued out of the district court of the county of Hennepin requiring the respondent, as county auditor, to accept and file the affidavit of candidacy on payment of the filing fee or to show cause why he had not done so. The respondent appeared and alleged in his answer the failure of the relator to comply with the statute in the respect indicated. The relator interposed a general demurrer to the answer, which the trial court overruled. Judgment was accordingly entered quashing the writ, from which the relator appealed. His appeal involves the validity of the primary election law of 1912 in so far as it provides for classifying or grouping candidates on the primary ballot, when two or more persons are to be elected for the same office.

The provisions of the statute relevant to this question are these:

"When two or more persons are to be elected for the same office, at a general election running at large in a city, county, district or in this state, such offices shall be classified and numbered as hereinafter provided and the nonpartisan nominees to be placed upon the general election ballot shall be the two candidates in each such class who shall receive the highest number of votes at such primary election. * * * Where there are two or more offices to be filled by candidates running at large in a city, county, district or in the state, such

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offices shall be classified and numbered one, two, etc., using as many classes and numbers as there are offices at large to be filled. * * * The officer preparing said ballot shall provide as many classes and numbers as there are offices at large to be filled. Every person when filing as a candidate for the nomination for any such office shall designate in his affidavit the number and class in which he desires to file and become a candidate and his name shall be placed on the ballot in such designated number and class. Such classes shall be rotated upon the ballots in the same manner as provided by law for the rotation of names of candidates. * * * The name of the candidate who has filed for such office, or who shall file for the same, shall not be placed on the ballot if he shall fail, neglect or refuse to designate the class and number in which he desires to file and become a candidate, as hereinbefore provided."

The contention of the relator, stated in general terms, is that these statutory provisions are void because they violate the state and Federal Constitutions. The record presents no Federal questions. See State v. Weber, 96 Minn. 422, 105 N. W. 490, 113 Am. St. 630, and State v. Scott, 110 Minn. 461, 126 N. W. 70, and same case in 219 U. S. 582, 31 Sup. Ct. 469, 55 L. ed. 345, dismissing a writ of error to this court. This leaves for our decision only the question whether the statutory provisions in question are forbidden by our state Constitution, for whatever the people have not by their Constitution incapacitated themselves from doing they may do by their representatives in the legislature, unless it be an act forbidden by the Federal Constitution.

The constitutional provisions relevant to the question are sections 1, 6, and 7 of article 7 of the Constitution of this state, which are to the effect following: Every qualified voter shall be entitled to vote at any election, in the election district of which he shall at the time have been for thirty days a resident, for all offices that now are, or hereafter may be, elective by the people. All elections shall be by ballot except for such town officers as may be directed by law to be otherwise chosen. Every person entitled to vote at any election shall be eligible to any office elected by the people in his election district, except as otherwise provided by this Constitution or the Constitution or laws

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of the United States. These constitutional provisions guarantee the right of a qualified elector to vote at any election, define the qualifications of an elector, and the conditions of eligibility to office, which cannot be changed or added to by statute. State v. Clough, 23 Minn. 17; State v. Holman, 58 Minn. 219, 59 N. W. 1006; State v. Bates, 102 Minn. 104, 111, 112 N. W. 1026, 12 An. Cas. 105.

The Constitution does not attempt to regulate the exercise of the right of eligibility to office or to vote, but they are, of necessity, left for legislative action. Therefore the legislature may make and impose such reasonable regulations and conditions which it deems necessary to secure a pure and orderly election and to guard against unfair combinations, undue influence, and coercion, although they may incidentally affect the right of an elector to vote, or his opportunities for securing an election to office. Such regulations, however, must be reasonable, uniform, and impartial; they must not be such as to defeat indirectly the constitutional rights of an elector or unnecessarily obstruct the exercise thereof. State v. Holman, supra; State v. Moore, 87 Minn. 308, 92 N. W. 4, 59 L.R.A. 447, 94 Am. St. 702.

The question then is whether the provisions of the primary election statute, as to grouping candidates, are, when tested by the rule stated, so clearly and palpably repugnant to the guaranties of the Constitution, with reference to the right to vote and eligibility to office, as to leave no fair doubt of their invalidity.

In considering this question we must keep in mind that our primary election, which is purely of statutory origin, is the selection, by qualified voters, of candidates for the respective offices to be filled, while an election, which has its origin in the Constitution, is the selection, by such voters, of officers to discharge the duties of the respective offices; and that statutory regulations applicable only to a primary election, which might be repugnant to the Constitution if extended to elections, are not necessarily invalid unless they are so onerous, unfair, or obstructive as practically to defeat the fair right of an elector to vote or to be elected to office. State v. Johnson, 87 Minn. 221, 91 N. W. 604, 840; State v. Moore, supra; State v. Scott, 99 Minn. 145, 108 N. W. 828.

In the case first cited it was held that, although the statute failed

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to provide for a blank space on the primary ballot, so that an elector could vote for any eligible person as a candidate he pleased, nevertheless the statute in this respect was a reasonable regulation and constitutional for the reason that it dealt with nominations for office and not with elections to office.

In the second case cited the constitutionality of Laws 1901, p. 304, c. 216, § 9, which prohibited a defeated candidate at a primary election from having his name placed on the official ballot as an independent candidate, was involved, and the statute was held to be valid and a fair and reasonable regulation and restriction, since there was a blank space on the official ballot, in which any elector might write the name of the defeated candidate and thus enable him to be elected, if he received the requisite number of votes.

Whether the provisions of the primary statute classifying or grouping candidates would be constitutional if extended to official election ballots, we neither consider nor decide, for the reason that such provisions have not been so extended; they begin and end with the primary statute; and, further, that the names of candidates selected at the primary election from any class or group must be placed upon the official election ballots under the general election statutes and in the same manner as the names of other candidates nominated at the primary election, except that those belonging to the nonpartisan class are not entitled to any party designation. R. L. 1905, §§ 182, 201; Laws 1912, p. 4, c. 2, § 2, and p. 53, chapter 12.

The relator, however, contends that the primary election law (Laws 1912, c. 2) is an election within the meaning of the Constitution, and that the decisions of this court to which we have referred were based upon a statute materially different from the one here under consideration in that by it party affiliations have been eliminated as to officers classified as nonpartisan. This does not affect the fundamental distinction, to which we have referred, between an election and a primary election, a regulation of the right to vote. It is also to be noted in this connection that the first twelve sections of the act of 1912 are amendments to the original primary election law (sections 181, 182, 184, 186, 187, 189, 193, 196, 197, 199, 200, and 201, R. L.

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1905) and must be so construed. The decisions referred to are therefore in point, and we adhere to them.

It is urged by the relator that the provision of the primary law providing for classification imposes conditions and restrictions as to an elector's eligibility to office, in violation of the Constitution, as it forces him to elect in which one of two or more classes he will seek a nomination. This does not affect his eligibility to office at the election, for the reason that the blank space required to be left on all official election ballots enables him to aspire to the office and invite his fellow citizens to vote for him by writing his name in the blank spaces on the ballots. State v. Moore, supra; State v. Bates, supra.

The relator further contends that he was denied the right to file as a candidate because he refused to designate the class in which he desired to file, which disfranchises him, contrary to our Bill of Rights (article 7, § 7, state Constitution). He and every other elector might with equal force claim that they were disfranchised because they refused to pay the filing fee, or to comply with any other reasonable regulation, of the exercise of the right to be elected to office. The claim of disfranchisement, so far as it relates to the primary election statute, is without merit.

Again, it is urged that the classification provision deprives the elector of his constitutional right to vote for any eligible person for office he pleases. The fact that the provision for classification does not extend to the official ballot brings this case within the rule of State v. Johnson, supra, and the other cases cited, and this contention of the relator must be and is overruled.

The last contention is to the effect that the classification made by the statute, as to cities of the first class and those having home rule charters, is an arbitrary one; hence it is unconstitutional. We are of the opinion that the classification is one within the reasonable discretion of the legislature, and that it is valid. State v. Scott, 110 Minn. 461, 126 N. W. 70.

We have attentively considered all the claims and suggestions of counsel in the premises, but the necessity for a prompt decision prevents a fuller discussion of them. Our conclusion is, and we so hold, that the provisions of the primary election statute of 1912, as to

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classifying of candidates, are not repugnant to the guaranties of the Constitution as to the right to vote and eligibility to office, and that the statute in this respect is not unconstitutional.

Judgment affirmed.

BUNN and HOLT, JJ., took no part.

GEORGE F. CASHMAN v. JULIUS A. SCHMAHL.[1]

August 31, 1912.[2]

No. 17,839.

Primary election — affidavit of nomination.

Held: (1) August 28, 1912, was the last day for filing with the secretary of state the affidavit for nomination as candidate for representative to the legislature to be placed on the ballot for the primary election on September 17 in that year, and (2) relator's affidavit, in designating the class as "A" instead of "1" was a substantial compliance with the statute. Laws 1912, c. 2. [Reporter]

George F. Cashman obtained from the court an order directing Julius A. Schmahl, as secretary of state, to receive and file relator's affidavit, and upon payment of the proper fee to cause relator's name to be placed upon the ballots to be used at the primary election on September 17, 1912, as a candidate for nomination as a Democrat for the office of representative in the legislature from the Fifty-third legislative district, Class 1 thereof, or show cause why he had not done so.

Respondent in his answer admitted that relator presented his affidavit of nomination, with the required fee on August 28, 1912, and alleged that respondent refused to accept the affidavit and the fee because (1) the statutory time for offering the same terminated with the close of office hours at 5 P. M. on August 27, 1912; (2) insufficiency of the affidavit in not containing all the statements required under the general election laws as amended by Laws 1912,

[1] Reported in — N. W. —.

[2] Special session of the court.

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p. 4, c. 2; and (3) that the affidavit was particularly defective in attempting to have relator's name certified by the various auditors of the counties constituting the Fifty-third legislative district as being a candidate for representative in Class A, Democratic ticket.

Thomas D. O'Brien, for relator.

Lyndon A. Smith, Attorney General, and *C. Louis Weeks,* Assistant Attorney General, for respondent.

PER CURIAM.

This matter was heard upon an order requiring the respondent to show cause why he should not be directed to receive and file the relator's affidavit for nomination as Democratic candidate for representative in the legislature from the Fifty-third legislative district, Class 1, and to cause the relator's name so to be placed upon the ballot, to be used at the primary election on September 17, 1912.

After hearing the parties and duly considering the matter, we have reached the conclusion that the relator's affidavit for nomination with the necessary filing fee was tendered to the respondent on August 28, 1912, and in due time, such day being the last day for filing such affidavits, and that the relator's affidavit was not technically correct, in that it designated the class as "A" instead of "1," but that such designation of the class number was substantial compliance with the statute.

It is therefore ordered that the respondent Julius A. Schmahl, as secretary of state, accept the relator's affidavit, if accompanied with the legal filing fee, file the same as of August 28, 1912, and forthwith certify to the several county auditors in the Fifty-third legislative district the name of the relator as a Democratic candidate in Class 1 at the ensuing primary election for representative from such district.

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P. D. WINSHIP v. JULIUS A. SCHMAHL.[1]

August 31, 1912.[2]

No. 17,840.

Primary election — affidavit of nomination.

Held: (1) August 28, 1912, was the last day for filing with the secretary of state the affidavit for nomination as candidate for representative to the legislature to be placed on the ballot for the primary election on September 17 in that year, and (2) relator's affidavit, in designating the class as "B" instead of "2" was a substantial compliance with the statute, Laws 1912, p. 4, c. 2. [Reporter]

P. D. Winship obtained from the court an order directing Julius A. Schmahl, as secretary of state, to receive and file relator's affidavit, and upon payment of the proper fee to cause relator's name to be placed upon the ballots to be used at the primary election on September 17, 1912, as a candidate for nomination as a Democrat for the office of representative in the legislature from the Fifty-third legislative district, Class 2 thereof, or show cause why he had not done so.

Respondent in his answer admitted that relator presented his affidavit of nomination, with the required fee, on August 28, 1912, and alleged that respondent refused to accept the affidavit and the fee because (1) the statutory time for offering the same terminated with the close of office hours at 5 P. M. on August 27, 1912; (2) insufficiency of the affidavit in not containing all the statements required under the general election laws as amended by Laws 1912, p. 4, c. 2; and (3) that the affidavit was particularly defective in attempting to have relator's name certified by the various auditors of the counties constituting the Fifty-third legislative district as being a candidate for representative in Class B, Democratic ticket.

Thomas D. O'Brien, for relator.

Lyndon A. Smith, Attorney General, and *C. Louis Weeks,* Assistant Attorney General, for respondent.

[1] Reported in — N. W. —.
119 M.—11.

[2] Special session of the court.

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PER CURIAM.

This matter was heard upon an order requiring the respondent to show cause why he should not be directed to receive and file the relator's affidavit for nomination as Democratic candidate for representative in the legislature from the Fifty-third legislative district, Class 2, and to cause the relator's name so to be placed upon the ballots to be used at the primary election on September 17, 1912.

After hearing the parties and duly considering the matter, we have reached the conclusion that the relator's affidavit for nomination with the necessary filing fee was tendered to the respondent on August 28, 1912, and in due time, such day being the last day for filing such affidavits, and that the relator's affidavit was not technically correct, in that it designated the class as "B" instead of "2," but that such designation of the class number was substantial compliance with the statute.

It is therefore ordered that the respondent Julius A. Schmahl, as secretary of state, accept the relator's affidavit, if accompanied with the legal filing fee, file the same as of August 28, 1912, and forthwith certify to the several county auditors in the Fifty-third legislative district the name of the relator as a Democratic candidate in Class 2 at the ensuing primary election for representative from such district.

CITY OF JORDAN v. MARY LEONARD.[1]

October 11, 1912.

Nos. 17,739—(74).[2]

Injunction — complaint sufficient.

A municipality, whose public streets and grounds have been placed under the control of its common council, or other officers, may maintain an action to abate a nuisance therein and to enjoin its maintenance. The complaint herein alleges facts constituting such a cause of action.

[1] Reported 137 N. W. 740.

[2] October, 1912, term calendar.

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Action in the district court for Scott county to compel the removal of a fence from a certain street and enjoin defendant and persons claiming under her from doing any act to interfere with the rights of the public therein. From an order, Morrison, J., overruling defendant's demurrer to the complaint, she appealed. Affirmed.

F. J. Leonard, for appellant.

George F. Sullivan, for respondent.

START, C. J.

Appeal from an order of the district court of the county of Scott overruling the defendant's demurrer to the complaint. The complaint alleges, in effect, the ultimate facts following:

The plaintiff has been for more than twenty years last past, and now is, a municipal corporation, duly organized, incorporated, existing, and being in the county of Scott and state of Minnesota, under and by virtue of Sp. Laws 1891, p. 120, c. 4. There is now in such municipality, and has been during all the times herein stated, and for more than twenty years last past, a public street and highway, known as Fourth street, which is wholly within the corporate limits of the plaintiff. Such street has been dedicated to the public as a public street and highway, and accepted by the public for that purpose. The defendant, without any right whatever, on May 5, 1911, built a fence in such street and thereby inclosed a portion thereof, and threatens to place other permanent structures therein, and to maintain such nuisance, whereby the street will be reduced in width sixteen feet, rendering it less convenient for public use and placing it in a dangerous condition, thereby causing a multiplicity of suits and working irreparable injury to the plaintiff. The plaintiff has no adequate remedy at law. Wherefore the plaintiff demands judgment abating the nuisance, and enjoining the defendant from maintaining such fence and structures in the street, and for general relief.

The defendant's first contention is that the city council, and not the city in its corporate name, should have instituted the action.

A municipality, whose public streets and grounds have been placed under the control of its common council, or other officers, may main-

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tain an action to abate a nuisance therein and to enjoin its maintenance. Village of Pine City v. Munch, 42 Minn. 342, 44 N. W. 197, 6 L.R.A. 763; Township of Hutchinson v. Filk, 44 Minn. 536, 47 N. W. 255; Village of Buffalo v. Harling, 50 Minn. 551, 52 N. W. 931; City of Red Wing v. Guptil, 72 Minn. 259, 75 N. W. 234, 41 L.R.A. 321, 71 Am. St. 485. The plaintiff's charter (Sp. Laws 1891, pp. 131 and 139) places the care and control of its streets, and the duty of keeping them free from nuisances, in the city council, who are its officers and agents. Therefore the action was properly brought in the name of the municipality.

The defendant's next contention is that the complaint does not allege that the street is opened and traveled, or any inclosure of any part of the street, because of a mistake in the description thereof; hence it does not appear from any of the allegations that irreparable injury will result to the plaintiff or the public by the alleged acts or threatened acts of the defendant.

The complaint directly alleges that the locus in quo is, and has been for more than twenty years, a public street and highway, and that the defendant has without right inclosed a portion thereof by a fence. The complaint then attempts to describe the part so inclosed by metes and bounds; but this description, by reason of an evident mistake therein, is, as defendant claims, an impossible one, and describes nothing. This may be conceded, and it necessarily follows that the allegations as to the attempted description are surplusage. It is clear that the allegations of the complaint shows that the alleged acts and threatened acts of defendant will result in real and serious injury; that is, irreparable injury. 2 Dunnell, Minn. Digest, § 4471.

A consideration of the ultimate facts, to which we have referred, alleged in the complaint, leads us to the conclusion that they constitute a cause of action.

Order affirmed.

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JOHN M. WALDEN v. O. N. CALEF.[1]

October 11, 1912.

Nos. 17,789—(18).

Election contest — jurisdiction of court.

The court, by virtue of Laws 1911, c. 59, acquires jurisdiction to hear and determine an election contest by the filing of notice of contest and appeal with the clerk of the court within ten days after the canvass of the votes. Service of the notice must be made on the contestee before the court can proceed to hear and determine the matter, but the statute does not limit the time in which this must be done.

Notice of contest — manner of service — jurisdiction.

It is, however, the duty of the contestant, after the court has acquired jurisdiction of the contest, to apply promptly for an order fixing the manner and the time within which the notice must be served. If he fails so to do, and to serve the notice within a reasonable time, the court may, and should on motion, dismiss the contest for inexcusable delay in prosecuting it, but, until so dismissed, the court retains jurisdiction of the subject-matter of the contest, and it may, in its discretion, make such reasonable order as to the service of the notice as it deems just.

Service of notice before order of court — motion to dismiss.

The notice herein was duly filed and personally served on the contestee within ten days after the canvass, but before any order was made by the court as to such service. The contestee specially appeared at the time fixed for hearing the contest, and moved the court to dismiss all the proceedings for the reason that the court had no jurisdiction over him. The court confirmed the service of notice, and ordered that it stand as the service ordered by the court, and informed the contestee that the hearing would be continued to enable him to prepare for trial, if he so desired. *Held*, that it was not error to deny the motion.

Election contest in the district court for Rice county. The history of the contest in that court is narrated in the opinion. The court, Childress, J., made findings of fact and as conclusion of law found that the contestee, O. N. Calef, was not lawfully elected

[1] Reported in 137 N. W. 738.

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alderman of the Third ward of the City of Northfield, and ordered judgment accordingly. From that order, the contestee appealed. Affirmed.

Albert Schaller and *Joseph Donaldson,* for appellant.

Lind, Ueland & Jerome, for respondent.

START, C. J.

The parties hereto were rival candidates for the office of alderman of the Third ward of the city of Northfield at an election held therein on March 12, 1912. On a canvass of the votes cast for alderman, and on March 16, 1912, the appellant herein, Calef, was declared elected to the office. Thereupon the respondent herein, Walden, instituted a contest of the election of the appellant, and appealed to the district court of the county of Rice. On March 22, 1912, due notice of the contest and appeal was personally served on the appellant, and the original notice, with proof of such service, was duly filed with the clerk of such court. The contest was set for hearing on April 1, 1912, at a special term of the court at Northfield, at which time and place the appellant appeared specially and filed an objection, which was in these terms:

"Contestee appears specially for the purpose of objecting to a special term at Northfield for further proceeding in the above-entitled matter."

Thereupon the court ordered that a special term of court be held at the courthouse in the city of Faribault on April 10, 1912, at eleven o'clock in the forenoon, for the trial of the cause. The trial judge, being unable to be present at the time named, adjourned the hearing of the cause, on his own motion, to May 1, 1912, at the same hour and place. Court convened pursuant to such adjournment, and the appellant appeared specially and made the motion following:

"The contestee appears specially and objects to the jurisdiction of the court, and moves that all proceedings in the above entitled matter be dismissed and discontinued, for the reason that the court has no jurisdiction over the contestee."

Thereupon, it appearing that the notice of contest and appeal were so served before an order was made by the court directing

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the time and manner of the service, as provided by Laws 1911, p. 78, c. 59, the court, on motion of the respondent, made its order nunc pro tunc confirming such service of the notice of appeal upon the appellant, and directing that it stand as the service of the notice of appeal ordered and directed by the court in the cause. The court, upon announcing such order, informed appellant and his counsel that, if they so desired, the cause would be adjourned, so as to allow them ample time to prepare for trial. Counsel then informed the court that they did not desire an adjournment, and that they would take no further part in the cause. The motion to dismiss the proceeding was denied, and appellant and his counsel left the courtroom. The trial then proceeded, and resulted in the order and judgment of the court to the effect that the election in question as to alderman was void, and that the appellant was not elected, from which the appellant appealed to this court.

The sole question presented by the record for our decision is whether the trial court erred in denying appellant's motion to dismiss all the proceedings in the cause, for the reason that it had no jurisdiction over the appellant. Prior to the amendment of R. L. 1905, § 336, by chapter 59, p. 78, Laws 1911, it was necessary, in order to confer jurisdiction upon the court to hear an election contest, to file and also serve the notice of appeal within ten days after the canvass was completed. Odegard v. Lemire, 107 Minn. 315, 119 N. W. 1057. But by the amendment the court acquires jurisdiction of the subject-matter of the appeal upon filing notice of the contest and appeal within ten days after the canvass. Service of the notice on the contestee must be made before the court can proceed to hear and determine the matter; but the statute does not limit the time in which the notice must be served or the proceedings dismissed for want of prosecution. The time and manner of the service of the notice rest in the sound discretion of the trial court.

It is the duty of the contestant, after the court acquires jurisdiction of the subject-matter of the contest by the filing of the notice, to apply promptly—that is, within a reasonable time— to the court for an order fixing the manner and the time within which the notice of appeal must be served. If he fails so to do within a reasonable

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time, the court may, and should, on motion, dismiss the contest for inexcusable delay in prosecuting it; but, until so dismissed, the court retains jurisdiction of the subject-matter of the contest, and may in its discretion make any reasonable order as to the service of the notice it deems just.

The question presented by the record, in its last analysis, is whether the trial court was bound as a matter of law to dismiss all proceedings in the cause; that is, dismiss the contest, because the notice of appeal was served before the court directed the time and manner of service. It logically follows, and we so hold, from our construction of the amendment of 1911, that the court had not lost jurisdiction of the subject-matter of the contest when the motion was made to dismiss the contest; that it then had jurisdiction to make, in its discretion, such order touching the service of the notice as it deemed reasonable and just; that, whether the omission to obtain an order fixing the time and manner of serving the notice before serving it was a mere irregularity or not, it did not affect the jurisdiction of the court; and, further, that the order made by the court was, upon the admitted facts, well within its discretion, and the motion to dismiss the contest was rightly denied.

Order affirmed.

WILLIAM C. FOSTER v. P. B. MALBERG and Others.[1]

October 11, 1912.

Nos. 17,813—(17).

County auditor's bond — liability.

In an action upon the official bond of a county auditor, wherein both the auditor and his sureties are made defendants, the terms of the bond define and determine the extent of the auditor's liability, which is no greater and no less than that of his sureties; the liability of both being measured by the terms of the bond, reasonably, but strictly, construed.

[1] Reported in 137 N. W. 816.

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Defects in tax sale — conclusive presumption against purchaser.

Although the requirement of R. L. 1905, § 927, that a certain notice must be given by a county auditor before he sells lands for taxes, is mandatory, and calls for a purely ministerial act on the part of the auditor, the nonperformance of which renders a sale by him void, yet under the doctrine of caveat emptor, as applied to tax sales, the purchaser at such a sale is conclusively presumed to know of the existence of every defect in such proceedings; and hence, if, by reason of the auditor's failure to give the prescribed notice, the purchaser fails to obtain a valid title, it must be considered that the latter's own want of proper care and diligence, and not the neglect or default of the auditor, was the proximate cause of the purchaser's injury, so that the latter can have no recovery against the former therefor, in the absence of statute to such effect.

Statute inapplicable.

In such a case the liability of the auditor is neither enlarged nor diminished by R. L. 1905, § 4533, providing that an official bond shall be security to all persons severally for the official delinquencies against which it is intended to provide, and that any person injured thereby, or who is by law entitled to the benefit thereof, may sue thereon in his own name.

Action in the district court for Marshall county against defendant Malberg and the sureties upon his official bond to recover $3,500 upon the bond. From an order, Grindeland, J., sustaining defendants' demurrer to the complaint, plaintiff appealed. Affirmed.

William G. White, for appellant.

F. A. Grady, for respondent.

Philip E. Brown, J.

This is an action, instituted after leave duly obtained, upon the official bond of the defendant Malberg as auditor of Marshall county, the other defendants being his sureties on the bond, and the appeal is from an order sustaining the general joint demurrer of the defendants to the complaint.

The bond here involved is in the usual form, conditioned that the defendant Malberg "shall well and faithfully discharge the duties of county auditor during his continuance in office," and the default alleged as constituting a breach of this condition consists of his failure to give the statutory notice, as required by R. L. 1905, § 927, of

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a certain land tax sale at which the plaintiff became the purchaser of a tract of land, by reason of which default, it is alleged, the plaintiff's title to the land so purchased was rendered void and the plaintiff was damaged in a certain sum, alleged to be the same in amount as the stated value of the land. Aside from this irregularity, all proceedings necessary to vest the plaintiff with a valid tax title to the said land are alleged to have been duly had, and the plaintiff's cause of action is predicated solely upon the claim that he lost the title to the land and suffered damages because of the failure of the defendant auditor to give the notice of the said land tax sale.

1. While probably not material in our view of the case, we will first advert to and dispose of a contention of the plaintiff to the effect that in this action the defendant auditor may be held liable, even if the sureties be excused. This contention cannot be sustained. The action is based squarely upon a breach of a statutory bond, and the terms of the bond define and determine the extent of the auditor's responsibility. County of Hennepin v. Jones, 18 Minn. 182 (199). And the following proposition, found in note 3, 91 Am. St. 503, is well sustained by the authorities: "Whatever may be the extent of the liability of an officer, personally or otherwise, outside of his bond, so far as his liability on the bond is concerned it is no greater nor less than that of his sureties on the instrument. The liability of both is measured by the terms of the bond, reasonably, but strictly, construed."

2. This appeal might, perhaps, well be disposed of upon the ground that in any event no foundation is laid in the complaint for an assessment of damages; but we are not inclined to pursue this narrow view, for to do so would be to dispose of the case upon a mere technicality.

Coming, then, to the merits, the first question which the plaintiff insists is involved, as in effect stated by him, is: Did the failure of the defendant Malberg to perform the ministerial and official duty of giving the statutory notice of the tax sale, prescribed by R. L. 1905, § 927, and which clearly avoided the sale, render him and his sureties liable upon his official bond to the plaintiff, a purchaser at such sale, assuming that the plaintiff did suffer damage? In answering this question, we need not consider the liability of the sureties separately

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from that of their principal; for, the action being upon the bond, the liability of the principal and that of the sureties is, as already declared herein, coextensive and interdependent. The only question, therefore, necessary here to be considered, is whether the defendant Malberg's alleged default renders him liable to this plaintiff.

"Before making such a sale," declares the statute with regard to tax sales by a county auditor, "he shall give ten days' posted notice thereof * * * and two weeks' published notice." This statute, as claimed by the plaintiff, is not only mandatory, but the giving of the prescribed notice is a jurisdictional prerequisite to the right of the auditor to sell the lands, and the failure to give the notice renders the sale void. McCord v. Sullivan, 85 Minn. 344, 88 N. W. 989, 89 Am. St. 561; Olson v. Phillips, 80 Minn. 339, 83 N. W. 189. The giving of the notice is, furthermore, a purely ministerial duty, and calls for the exercise of no discretion on the part of the auditor. Wherefore it is argued by the plaintiff that the defendant Malberg is liable, under the doctrine that a public officer is answerable to any one injured by his nonperformance of a merely ministerial duty, and this without regard to the motives of such officer and without reference to any question of corruption—a doctrine which must be conceded to be sound and well established by the authorities. See Amy v. Supervisors, 11 Wall. 136, 20 L. ed. 101; Raynsford v. Phelps, 43 Mich. 342, 5 N. W. 403, 38 Am. Rep. 189; Owen v. Hill, 67 Mich. 43, 34 N. W. 649; 29 Cyc. 1455; 2 Cooley, Torts (3d ed.) §§ 442–445; 5 Thompson, Negligence, § 6386. But it by no means follows from the above that this particular defendant is liable to this particular plaintiff; for their relation brings them within the operation of another doctrine equally as well settled as those above referred to, and which declares nonliability, namely, the doctrine of caveat emptor as applied to tax sales. We might dispose of this point by the mere citation of authority, as we have been referred to at least one case which squarely determines all of the plaintiff's contentions against him (see Hamilton v. Valiant, 30 Md. 139), and there are others which we deem equally as conclusive to the same effect (see Lindner v. City, 116 La. 372, 40 South. 736, 7 An. Cas. 919), and, furthermore we find no authorities to the contrary; but counsel for

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the plaintiff has so earnestly contended that this doctrine, no matter how often generally declared, can have no just or logical application to the present case, that we deem it advisable to consider the matter at some length.

That the doctrine of caveat emptor applies to tax sales generally is so well settled that citation of authority is scarcely necessary to this proposition in the abstract. The plaintiff concedes this, and cites a Minnesota case to such effect. See Coles v. County of Washington, 35 Minn. 124, 27 N. W. 497. The rule is well stated in American v. Beadle County, 5 S. D. 410, 59 N. W. 212, as follows: "It seems to be a general rule, at common law, laid down by the text-writers and applied by the courts, that one who buys land at a tax sale is never a bona fide purchaser, and that, if his title fail for any reason, he has no remedy against the municipality for whose benefit the land was sold, independent of a statutory provision affording him relief. The authority of the officer to sell at tax sale is derived wholly from the statute, and is a naked power, with which no interest is coupled. The rule of caveat emptor applies with all its force to a purchaser at such sale, who pays his money voluntarily, with the expectation of procuring the property at a grossly inadequate price, or of securing an exorbitant profit upon the investment in case the property is redeemed. Knowing that tax titles are to some extent uncertain, and that they usually depend upon numerous contingencies, he engages his means in speculation, and assumes the liability of having his title prove to be worthless; and in that event he cannot, in the absence of a statute, recover the amount he has paid, in an action against the county." And so, also, in City v. Humphrey, 84 Ind. 467, it is declared that "the general rule is beyond dispute that the purchaser at a tax sale assumes all risk, and, except as he may be vested by force of statutory provision with the lien which the state or municipality holds against the property of the delinquent taxdebtor, he is without remedy if he fails to obtain a good title under his purchase." See, also, Harding v. Auditor General, 136 Mich. 358, 99 N. W. 275; State v. Casteel, 110 Ind. 174, 11 N. E. 219; Minnesota v. Beadle, 18 S. D. 431, 101 N. W. 29; Pennock v. Douglas, 39 Neb. 293, 58 N. W. 117, 27 L.R.A. 121, 42 Am. St. 579, and note at page 588; 2

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Cooley, Taxation (3d ed.) 919, 921; Desty, Taxation, § 850; Blackwell, Tax Titles, § 643.

But counsel for the plaintiff, while admitting the rule as above stated, insists that it should not be applied to the case at bar, wherein the defect was in the proceedings leading up to the sale, and that it should be confined to the condition of the title which the officer offers for sale. It is insisted that the officer, at least in effect, warrants the regularity of his own acts, and will not, when called to account for his neglect, be heard to say to the purchaser: "You took your chances of the performance of my official duty, and, if my neglect of duty has damaged you, it is your fault and not mine." And yet this is, in effect, exactly what the law itself says.

"A tax sale," said the court, in Lindner v. City, 116 La. 372, 40 South. 736, 7 An. Cas. 919, "in the absence of special legislation to the contrary, is generally held to be subject to the rule of caveat emptor, and the purchaser assumes the risk of all illegalities and irregularities in the proceedings, of which, as they are open to his inspection, he is presumed to have notice." In that case the irregularity complained of was similar to that here involved, namely, insufficient advertisement, and it was sought to recover from the municipality the value of the property and the expenditures of the plaintiff with respect thereto; but it was held that there could be no such recovery. It is true that the action was against the municipality, whereas in the case before us the action is against the officer; and the plaintiff's counsel argues that this is a proper ground of distinction, and that the officer may be held liable, though the municipality may not. But we think the distinction is immaterial. In either case a conclusive presumption of notice obtains, and the question, in its last analysis, is resolved into one of proximate cause, which is unquestionably an essential element in every case where one person seeks damages for the noncontractual wrongs of another, and if the damage was not caused by the act complained of there can be no recovery.

Such being the case, how can the plaintiff recover when he is conclusively presumed to have been aware of the defendant auditor's neglect before he purchased the property? Can it be said in such

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a case that the damage was caused by the defendant's neglect? Is it not manifest that it was the result of the plaintiff's own fault? Such, in effect, is the reasoning of Hamilton v. Valiant, supra, a case on all fours with the one in hand. "The appellant," said the court in that case, "either became the purchaser of the property in question with a knowledge that the appellee had failed in the proper discharge of his duty by the omission to give the required notice, or was himself guilty of negligence in buying without inquiry and examination. In either aspect he will not be regarded in law as an innocent sufferer—blameless of having brought upon himself, by a want of proper care and diligence, the very wrong of which he complains."

It is true, as urged by the plaintiff, that in certain cases of execution sales, which may be admitted to be in some respects analogous to tax sales (see Sexton v. Nevers, 20 Pick. [Mass.] 451, 32 Am. Dec. 225; Friedlander v. Bell, 17 La. An. 42; Fleming v. Lockart, 10 Mart. O. S. [La.] 308), and also in cases where an officer has failed to register or index deeds to lands (see 34 Cyc. 1021), the officer has been held liable to the purchaser or incumbrancer for failure to comply with the requirements of the law; but it does not follow that a recovery could be had in such cases in the face of a showing that the injury was caused by the plaintiff's own neglect or that he acted with full knowledge of the officer's neglect complained of. If a further differentiation were necessary, it would be sufficient to say that in the case of a register of deeds the duty to record is owed primarily to all who shall subsequently have occasion to examine the records, whereas the duty to give notice of a tax sale is owed to the state, for whose benefit the sale is to be made, and to the property owner whose property is to be sold, and not to the tax purchaser; and in the case of an execution sale it is sufficient to say that the officer's position is more nearly analogous to that of a private vendor than is that of an officer selling for taxes, and that at an execution sale the purchaser pays approximately what the property is worth, whereas at a tax sale he buys at what usually amounts to a merely nominal price, with the certainty of an exorbitant profit whether his title holds or fails. Such being the nature of tax sales, no intendment is indulged in favor

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of the purchaser thereat, and, if he does not obtain the property itself, his only remedies are those specifically provided by statute.

The theory upon which a public officer is held liable to private individuals for official neglect or misfeasance with respect to ministerial duties is closely aligned to the doctrine of negligence, being, indeed, generally referred thereto. See 5 Thompson, Negligence, c. 155; Street, Foundations of Legal Liability, 184; 2 Dunnell, Minn. Dig. § 6976. And, such being the case, it seems to us proper, also, to apply to such cases the doctrine of contributory negligence, or at least to apply the doctrine of proximate cause to the extent of holding that where one, knowing of an officer's default or charged with notice thereof, nevertheless goes ahead and changes his position to his injury, it shall be deemed that his damage was the result of his own fault, and hence not actionable. To hold otherwise would be "virtually to allow a man to recover for self-inflicted injuries." Thompson v. Libby, 36 Minn. 287, 31 N. W. 52, wherein the principle above announced was applied in an action between private individuals for fraud or deceit. It makes no difference that the duty violated is a statutory one, for it is settled in this state that, in the absence of a clear legislative intent to the contrary, the defense of contributory negligence is available in such a case. Schutt v. Adair, 99 Minn. 7, 108 N. W. 811. And the same rule would apply, whether the defendant's default may technically be termed negligence, and the plaintiff's fault contributory negligence, or not.

The doctrine is well stated in Owen v. Hill, 67 Mich. 43, 34 N. W. 649. In that case it was held that a surety on a bond given to secure the performance of a contract for building a school house could not recover of the district trustees for moneys due him for materials furnished in the erection of the building, because of their failure to require the contractor to execute the statutory bond provided for in such cases. The liability of an officer for neglect in the performance of ministerial duties was expressly declared, and materialmen were held to be within the protection of the statutory requirement; but the plaintiff's injury was held to have been due to his own fault, thus precluding a recovery. "His relations to the parties to the contract," said the court, referring to the plaintiff, "were such that he must be

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held to be chargeable with notice that no bond was required by the board of trustees; and if he furnished material, not upon the presumption that such bond existed for his protection, but knowing the contrary, and upon the credit of the contractor, he is not in a situation to hold the individuals composing the board liable for negligence in not requiring the bond. The requirement of the statute was intended as a shield for the protection of the innocent, and not as a sword in the hands of one chargeable with notice of its violation."

We hold that, in the due application of the rule of caveat emptor to tax sales, the purchaser at such a sale must be deemed to know of the existence of every defect in the proceedings, and hence that if he purchases, and thus suffers loss because of the neglect of the officer to perform some ministerial duty, it must be considered that the proximate cause thereof was not the neglect or default of the officer, but the want of proper care and diligence on the part of the purchaser, and that the latter is without remedy, except as specifically provided by statute.

3. The plaintiff suggests that R. L. 1905, § 4533, authorizes a recovery in this action. This statute provides that an official bond shall be security to all persons severally for the "official delinquencies against which it is intended to provide," and that any person injured thereby, or who is by law entitled to the benefit thereof, may sue thereon in his own name. The statute, as applied to this case, in no wise enlarges or diminishes the common-law liability of the defendant auditor; for, as we have already pointed out, the plaintiff cannot be held to have been injured by the act of such defendant complained of. R. L. 1905, § 972, moreover, specifically gives the plaintiff a remedy by which the land in question may be charged with a lien for all moneys paid out by him upon the purchase thereof, with costs, penalties, etc., and fairly indicates that, so far as the "official delinquencies" of an auditor in the matter of tax sales are concerned, of the nature here involved, the remedy thereby provided is intended to be exclusive.

Order affirmed.

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JAMES KONKLE v. ST. PAUL CITY RAILWAY COMPANY.[1]

October 11, 1912.

Nos. 17,851—(194).

Ejecting passenger — foreign coin — evidence.

Action for ejecting passenger from a street car for failure to pay his fare. Evidence that conductor accepted and gave change for a Canadian quarter and subsequently demanded return of the change because the quarter was not good. Plaintiff returned the change, and, having no other money, was ordered to leave the car. There was no evidence defendant had given its conductor directions to refuse such coins. The court found the coin tendered was a Canadian coin and ordered judgment in favor of plaintiff. *Held:*

1. While the question whether Canadian coins pass as current money in this state is not involved, it is a matter of almost everyday experience to receive and pay such coins in St. Paul and other parts of the state.

2. Evidence that the identical quarter was received by plaintiff from defendant the preceding day as part of the change given him at that time was admissible.

3. The findings are supported by the evidence. [Reporter]

Action in the municipal court of St. Paul to recover $400 damages for wrongful eviction from defendant's street car. The answer admitted that on October 20, 1911, plaintiff boarded one of defendant's cars and tendered a coin practically the same size as that of a quarter issued by the United States Government in payment for his fare; that defendant assumed that the coin was lawful money of the United States, but when it discovered its mistake it returned the coin to plaintiff and demanded a return of twenty cents which had been given plaintiff in change, upon the ground that the coin in question was not lawful money of the United States; that plaintiff refused to pay the fare of five cents and voluntarily left the car. The reply was a general denial. The case was tried before Hanft, J., who made findings and as conclusion of law found that plaintiff was entitled

[1] Reported in 137 N. W. 738.

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to judgment for $50. From the judgment entered pursuant to the findings, defendant appealed. Affirmed.

W. D. Dwyer, for appellant.

C. R. St. John, for respondent.

PER CURIAM.

No important or doubtful question is presented in this case. The evidence justified the court in finding that plaintiff was wrongfully ejected from defendant's street car for the alleged failure to pay his fare. No physical force was used; but plaintiff was peremptorily ordered to leave the car, and he did so. When plaintiff took passage upon the car, he tendered to the conductor a Canadian quarter, which the conductor accepted, and handed to plaintiff in change two dimes. A few moments later the conductor returned to plaintiff, and stated to him that the quarter was not good, and demanded a return of the dimes. A dispute arose as to whether the quarter was current money; but, upon the conductor's insistence, plaintiff returned the change, and, having no other money with him, on the order of the conductor left the car and walked to his home.

The question whether Canadian coins are legal tender or pass as current money in this state is not necessarily involved in the action. It, however, may be said that it is a matter of almost everyday experience to receive and pay in such coin in the city of St. Paul and other parts of the state. The conductor did not refuse the coin in question on the ground that it was Canadian money, but, as he testified on the trial, because he understood it to be a coin of the province of New Brunswick. In this he was mistaken. The court found that it was a Canadian coin. Nor was there any evidence that the car company had given its conductors any directions to refuse such money in payment of fares. And, further, it appeared that the identical quarter was received by plaintiff from defendant through another conductor the preceding day as part of the change given him at that time. This evidence was proper. We hold that the findings are supported by the evidence.

Judgment affirmed.

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HERBERT JOHNSON v. JULIUS A. SCHMAHL.[1]

October 12, 1912.

Nos. 17,987—(267).

Title of act — nomination of candidates for state office.

The title to Laws 1912, c. 2, is fairly suggestive of a purpose to repeal all statutory provisions as to the nomination of candidates for state office by party conventions. The act in this respect is valid. It repeals the law as to such nominations, and no political party has now the right to nominate candidates for state office by a party convention.

Upon petition of Herbert Johnson, this court issued its order directing Julius A. Schmahl, as secretary of state, to place the name of C. W. Brandborg upon the ballot for the ensuing election as candidate of the Socialist Labor party for the office of Governor, or show cause why he had not done so. The facts are stated in the opinion. The respondent, among other matters, alleged in his answer that the state canvassing board did not certify the name of Charles W. Brandborg as the nominee of the Socialist Labor party as candidate for the office of Governor to be voted for at the next general election, for the reason that said Brandborg failed to receive at the primary election a number of votes equal to ten per cent of the average vote cast at the preceding general election for the office of Governor, lieutenant governor, state auditor, secretary of state, state treasurer and attorney general. Order discharged.

J. T. Avery, for petitioner.

Lyndon A. Smith, Attorney General, and *Alexander L. Janes,* Assistant Attorney General, for respondent.

PER CURIAM.

This matter came before the court upon an order requiring respondent, as secretary of state, to show cause why he should not be directed to place upon the official ballot, for the next general election, the name

[1] Reported in 137 N. W. 741.

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of C. W. Brandborg as the candidate of the Socialist Labor party for Governor, and to indicate on the ballot that he is the candidate of such party.

The Socialist Labor party is a political party maintaining a party organization within this state, and on June 23, 1912, it held a convention and nominated C. W. Brandborg as its candidate for Governor, and a certificate thereof was, on July 16, 1912, tendered to the secretary of state, with the filing fee, which he refused to receive. Thereupon, and on the same day, Brandborg duly filed for nomination by his party as a candidate for Governor at the primary election to be held September 17, 1912. He failed to receive the necessary number of votes to entitle him to have his name as such candidate placed on the official ballot for the next general election. Thereafter, and on October 5, 1912, the certificate of his nomination by a convention of his party was again tendered to the secretary of state, and refused.

The contention of the petitioner is that chapter 2, p. 4, Laws 1912, is unconstitutional so far as it purports or attempts to repeal the then existing provisions of the statute as to nomination by party conventions for state office, for the reason that such subject is not expressed in the title of the act. The title is this: "An act to amend sections 181, 182, 184, 186, 187, 189, 193, 196, 197, 199, 200, 201, 217, 218, 241, 247, 251, and 316 of the Revised Laws of 1905, and acts amendatory thereof, relating to registration of voters and to primary and general elections, and to add certain provisions relating to registration of voters and to primary and general elections, and to repeal any acts or parts of acts inconsistent herewith." This title, by reference to the sections of R. L. 1905, therein named, indicates that the intention of the act is to amend the existing primary statute, and clearly suggests a purpose to extend the provisions of the primary statute to the nomination of candidates for state office. The carrying into effect of such purpose necessarily involved a repeal of the provisions of the existing statute as to the nomination of such candidates by party conventions, in order to prevent intolerable confusion and absurdities. It is clear that the title to the act is fairly suggestive

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of its subject-matter, and that the act is constitutional. 3 Dunnell, Minn. Digest, §§ 8907, 8908.

It is further urged that, conceding the act to be valid, it did not then repeal the then existing statutory provisions authorizing and regulating nominations by party conventions. The claim is without merit, for section 21 of the act repeals, except as therein stated, all acts and parts of acts inconsistent with the provisions of the act. That this section repealed the law providing for party nominating conventions is not a debatable question, and we so hold, following State v. Jensen, 86 Minn. 19, 89 N. W. 1126. The case cited held that the primary statute of 1899,[1] as amended by Laws 1901, p. 297, c. 216, repealed, as to all elective offices within its purview, the law as to the party nominating conventions, and that thereafter no political party had a right to nominate candidates for such offices by a party convention.

It is therefore ordered that the order to show cause herein be and it is hereby in all things discharged.

TRUSTEES OF LITTLE CEDAR CONGREGATION OF ADAMS v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.[2]

October 18, 1912.

Nos. 17,665—(29).

Fire from locomotive — verdict sustained by evidence.

The defendant's railway track was 275 feet from plaintiff's church, which was destroyed by fire. The nearest point from the track where, under the testimony, the fire could have originated, was 150 feet. *Held*, upon an examination of the record, that the evidence justified the jury in finding that the fire was set by sparks thrown from a locomotive passing over the track.

[1] [Laws 1899, p. 447, c. 349.] [2] Reported in 137 N. W. 970.

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Objection not available upon appeal.

An objection that a question put to a witness assumes a fact not proven cannot be urged on appeal, unless made at the trial.

Charge to jury.

Where the court, in charging the jury, referred to the necessity of resorting to circumstantial evidence as to the origin of fire set by sparks, because sparks emitted in the daytime are, ordinarily speaking, invisible, no unfairness or prejudice can result from thus stating common knowledge.

Verdict not ambiguous.

A verdict assessing damages in a certain sum, with interest at six per cent, is not uncertain or ambiguous, when the record shows the date from which such interest should be computed.

Action in the district court for Mower county against defendant railway company, Joseph Opie and D. S. Barr to recover $7,000 damages for loss of a church building by fire alleged to have been caused by sparks from defendant company's locomotive. The separate answers of defendant company and defendant Barr denied knowledge as to whether the building was destroyed or damaged by fire. The replies were general denials. The case was tried before Kingsley, J., and a jury which returned a verdict in favor of plaintiff for $4,000. From an order denying its alternative motion for judgment notwithstanding the verdict or for a new trial, defendant company appealed. Affirmed.

F. W. Root and *Catherwood & Nicholsen,* for appellant.

French & Sasse, for respondent.

HOLT, J.

In an action to recover for the loss of its church building by fire claimed to have been set by a locomotive of the defendant railway company, plaintiff had a verdict, and the company appeals from the order denying its alternative motion for judgment notwithstanding the verdict or for a new trial. Two servants of the company were made parties defendant. The jury found in favor of one, the engineer in charge of the locomotive, and as to the other the action was dismissed on motion.

Under Laws 1909, p. 454, c. 378 [R. L. Supp. 1909, § 2041], the

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railway company's liability is established, if the evidence justified the jury in finding that the fire which destroyed plaintiff's church was communicated directly or indirectly by a locomotive of the company. No negligence need be proven in this case against the railway. The main contention urged by appellant is that the evidence does not support the conclusion that its locomotive, which, about one o'clock in the afternoon of June 21, 1910, passed within 150 feet of plaintiff's premises, set the fire which, within twenty or thirty minutes thereafter, was discovered burning in or about the front steps of the building and eventually consumed it.

The church in question was situated in Mower county, about twelve miles easterly of Austin, near the line of defendant's railway running to Calmar. The building faced south; the steps encroaching apparently on a public highway running east and west. A creek ran north and south about 200 feet west of the church. The ground between was a cemetery, and was inclosed on the south by a wire fence running from the building along the highway to the creek. To the south of the highway was a pasture, and south of that the company's right of way ran in a southeasterly direction, so that the track was 150 feet directly south of the southwesterly corner of the cemetery, and 275 feet directly south of the front of the church. A cement bridge was just built by defendant over this creek, where it crossed the right of way, some 100 feet further west than the place where the creek intersected the highway. The railway bridge was some twenty feet higher than the banks of the creek, and the roadbed towards the east was elevated above the level of the surrounding country, from twenty feet at the creek bank to about nine or ten feet directly south of the church. Some groves on either side of the right of way served to deflect the direction of the wind when blowing from certain quarters. At the time of the fire the season was unusually dry, and a moderate wind was blowing from the southeast. No fire was set south of the highway. There was evidence to the effect that a narrow strip, from a foot to a foot and a half in width, was burned under and along the fence mentioned, from the creek to the church; also that, when the fire was first noticed, it was on the westerly side of the building adjacent to the front steps. If the locomotive set the

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fire, the sparks must have blown 150 feet, and started at the southwest corner of the cemetery, and followed along the fence to the building, or else a greater distance, if the fire was first kindled near the church steps.

No good purpose will be served by an extended discussion of the evidence. An attentive examination of the record would seem to justify the conclusion of the jury as to the origin of the fire. The situation of the church, the elevation and grade of the railway track, the force and direction of the wind, the deflection of the wind by the location of groves, the unusual dryness of the season, the time and place of the discovery of the fire, and the testimony tending to eliminate every other cause as to its origin than the one from sparks cast by defendant's locomotive, give such basis for the verdict that we are unable to say that the trial judge erred when he refused to disturb it. Cases are not wanting wherein verdicts find that sparks from a locomotive set fires more than 150 feet from the track upon which it ran. Johnson v. Chicago, M. & St. P. Ry. Co. 31 Minn. 57, 16 N. W. 488; Hoffman v. Chicago, M. & St. P. Ry. Co. 40 Minn. 60, 41 N. W. 301; Knight v. Chicago, 81 Iowa, 310, 46 N. W. 1112; Colorado v. Snider, 38 Colo. 351, 88 Pac. 453.

A witness who came upon the ground within an hour after the fire started was asked this question: "Now, what effects of the fire there did you see, if any? What part burned, if any?" Defendant objected that it was too remote. Clearly the court was right in permitting an answer. On cross-examination, plaintiff asked defendant's witnesses regarding another fire set by the same locomotive on the same trip. To such questions defendant objected, on the ground that it was incompetent, irrelevant, and immaterial, and again that it was not cross-examination. Sometimes the objections were sustained and again the question was withdrawn. One witness was allowed to answer, it being proper cross-examination as to him. Appellant does not now claim that evidence that the locomotive in question set other fires, or threw sparks, on the same trip, is not admissible. Still it is insisted that it was prejudicial to assume in the question a fact not yet proven. But in the objections made at the trial to these questions,

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the point now urged was not raised, and we must decline to consider it.

The court, in stating to the jury the contentions of the parties, said that plaintiff did not claim that any one saw the sparks escape from the locomotive, or saw the fire when it started, but claims that the circumstances were such as to lead to the inference as a fact that the fire originated from the locomotive, and then follows in the same sentence this language, which the appellant claims to be unfair and prejudicial: "In cases like this, proof of that kind or proof of circumstances is usually such proof as is necessarily resorted to, to establish facts of that kind; because in the daytime, as one of the witnesses said, 'you can't see a spark,' and, frequently, if a fire does originate from a spark, the first result that is discoverable is smoke and fire from combustible material, which is communicated by a spark, so that, ordinarly speaking, it may be said as a matter of fact that there are no eyewitnesses to fires which come from [a] passing locomotive." We fail to see wherein the court's observation in regard to common knowledge may be said to be unfair to appellant.

It is contended that the verdict is ambiguous and uncertain. It reads: "We, the jury impaneled and sworn in the above-entitled action, find for the plaintiff and assess its damages in the sum of $4,000.00, Four Thousand and $^{00}/_{100}$ Dollars, against the defendant Chicago, Milwaukee & St. Paul Railway Company only with interest at 6 per cent"—dated January 11, 1912, and signed by the foreman. The pleadings show that the church was destroyed June 21, 1910, and the court charged the jury that, if the verdict was for plaintiff, it should be for the value of the property destroyed on June 21, 1910, and interest at six per cent per annum from that date until the day of the verdict. It appears to us that from the record the verdict is certain, and by mere computation the correct amount may be inserted in the judgment. There being other defendants in the action than the one named in the verdict, it is evident that the word "only" therein refers to the defendant railway company, and not to the amount. Cohues v. Finholt, 101 Minn. 180, 112 N. W. 12.

The order must be affirmed.

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JOSEPH H. EMPENGER v. MARY FAIRLEY.[1]

October 18, 1912.

Nos. 17,692—(28).

Case followed.

An executor may appeal from a judgment of the probate court construing the will and assigning the property to a devisee. Burmeister v. Gust, 117 Minn. 247, 135 N. W. 980, followed and applied.

Vacation of street — case inapplicable.

The rule in Wait v. May, 48 Minn. 453, that the grant of a lot in the original plat of the village of Excelsior bounded on Lake street is presumptive evidence of an intention to convey title to the full width of Lake street and to the shore of the lake, has no application to conveyance by deed or devise after Lake street has been vacated.

Vacation of street.

The village of Excelsior had power to vacate a portion of Lake street and properly exercised such power.

Same — construction of deed.

After such vacation, the owner of a lot in such original plat conveyed by metes and bounds that part of the lot south of Lake street, and by a separate deed conveyed to the same grantee that part of the lot north of Lake street and between such street and the lake shore. *Held*, that the first named deed did not convey title beyond the center line of that portion of Lake street not vacated, and that a devise by the grantee referring to said deed for a description of the real estate devised, gave title to the devisee only to said center line.

Admission of evidence.

There was no reversible error in the rulings on the admission of evidence.

From that part of the decree of the probate court for Hennepin county assigning to Mary Fairley certain property belonging to the estate of Josephine Schmeidel, deceased, Joseph H. Empenger, as executor of the estate, appealed to the district court for that county. The appeal was heard by Steele, J., who made findings of fact and as

[1] Reported in 137 N. W. 1110.

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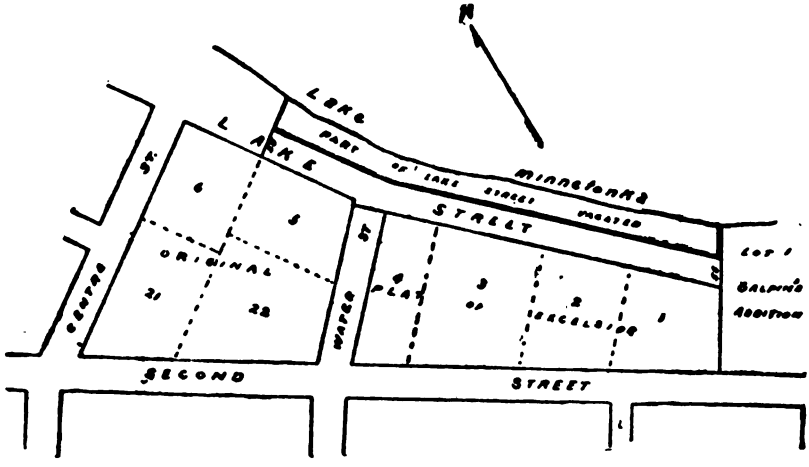
conclusion of law modified the decree of the probate court so far that no part of lot 3 mentioned in the opinion lying between the center line of Lake street and the lake shore should be assigned to Mary Fairley. From an order denying her motion for a new trial, Mary Fairley appealed. Affirmed.

A. B. Choate, for appellant.

Hicks & Carleton and *George A. Carleton,* for respondent.

BUNN, J.

Josephine Schmeidel, a resident of Hennepin county, died October 28, 1910, leaving no husband or children. At the time of her death she was the owner of part of lot 3 in the original plat of the village of Excelsior. Her portion of the lot was the center one-third of the northerly half, and fronted on Lake street, overlooking Lake Minnetonka. The location of lot three with reference to Lake street and the lake is shown by the following plat:



The decedent left a will which contained the following devise: "I devise all of that certain piece of land known as part of lot 3, Village of Excelsior, Minnesota, and recorded in the office of the

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register of deeds of the county of Hennepin, Minn., in Book 632 of Deeds, on page 155, etc. to Mary Fairley."

Respondent, the executor of the will, in August, 1911, petitioned the probate court to construe the above devise to Mary Fairley, the doubt being as to whether under it the devisee took title to the entire lot owned by the testatrix, including that portion thereof lying between the southerly line of Lake street and low water mark, or whether her title stopped at the southerly line of Lake street. The probate court assigned the entire lot to Mary Fairley. The executor appealed to the district court, where the decree of the probate court was reversed or modified so that by its terms no part of lot 3 lying between the center line of Lake street and the lake shore should be assigned to Mary Fairley. The case comes to this court on appeal by Mary Fairley from an order denying her motion for a new trial.

1. Appellant's first contention is that the appeal of the executor to the district court should have been dismissed for the reason that the executor had no right to appeal. We hold against this contention, following and applying Burmeister v. Gust, 117 Minn. 247, 135 N. W. 980.

2. The case on the merits involves a construction of the devise above quoted; the real question is as to the intention of the testator as derived from the language of the will, construed in the light of the surrounding circumstances and subject-matter. The deed referred to in the devise discloses a conveyance by Mary Fairley to Josephine Schmeidel of that part of lot 3 lying southerly of the south line of Lake street. The deed was executed March 23, 1907, recorded March 25, 1907; and described by metes and bounds the property conveyed. On the same day Mary Fairley executed another deed to Josephine Schmeidel, in which the description of the property conveyed was "a strip of land lying between the northerly boundary line of Lake street and the shore of Lake Minnetonka lying northerly from a part of lot three (3) in the original plat village of Excelsior, now owned by the said Mary Fairley, together with all the riparian rights of the said first parties to this parcel of land."

At the time these deeds were given, Mary Fairley was the owner of the center third of the northerly half of lot 3, and her title ex-

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tended to the lake shore, under the rule of Wait v. May, 48 Minn. 453, 51 N. W. 471. Her title was acquired in May, 1898. In the deed to her, as well as in all prior conveyances, the property was described as lot 3, or some part of lot 3, according to the original plat of Excelsior, or else the tract so conveyed was described by metes and bounds in words and figures which stated the northerly boundary line of the tract so conveyed to be coincident with the southeasterly boundary line of Lake street adjacent thereto. It is conceded that the grantee in each such conveyance took to the lake shore as part and parcel of the lot.

But while Mary Fairley was the owner of the tract, a part of Lake street was vacated. This vacated portion is shown on the above plat. This made her the owner of a strip of land adjacent to the lake shore free and clear from the public easement of a street. Under the rule of White v. Jefferson, 110 Minn. 276, 124 N. W. 373, 641, this strip was no longer a part or parcel of the tract south of Lake street; it was a separate tract; a conveyance by metes and bounds or other description of the tract south of Lake street would no longer give title to the lake shore, and would not include the vacated portion of the street. Mary Fairley could convey all she owned, or any part of it, and there was no longer the presumption from a description bounded on the street, either by reference to a plat or by metes and bounds, of an intention to convey to the lake shore. This, it seems to us, furnishes the most reasonable explanation of the fact that two deeds were deemed necessary to complete the transaction between Mary Fairley and her grantee. It was apparently considered, as was in truth the case, that the grantor was the owner of two separate parcels of land, separated by a street. The first deed, that referred to in the devise, did not, in view of the vacation of a portion of Lake street, convey to the lake shore, but only to the center line of that portion of Lake street that was not vacated. The second deed transferred the vacated strip adjacent to the shore. Of course, the will devised no more land than that described in the deed referred to, and if the vacation was valid, it follows that this was only that portion of lot 3 which was southerly of the center line of Lake street as it was after a portion thereof had been vacated.

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But appellant contends that the vacation of Lake street adjoining the shore was invalid. It is insisted that this portion of Lake street was a public landing, and therefore that the village of Excelsior had no power to vacate it. The findings of the trial court are against appellant on this point, and are sustained by the evidence.

We have considered carefully the question of the power of the village to vacate a street and the proceedings which resulted in the action vacating this portion of the street, and the fact that Mary Fairley was one of the petitioners for the vacation, and reach the conclusion that there is no good ground upon which it can be decided that the vacation was not valid.

It may have been the intention of the testatrix to give appellant the lake shore. If so, she failed to express that intention in her will. We cannot give effect to an unexpressed intention of the testatrix, nor can we add a term to the will or modify the language used in order to make what seems to us a proper or reasonable devise. There is no ambiguity in the language of the devise when we look at the deed referred to, and consider the fact that Lake street had been vacated and the fact that the vacated portion had been conveyed in a separate deed to which no reference is made in the will. It would have been easy to have referred to both deeds, or to have described the entire property, and we are not permitted to supply that additional reference or description for the testatrix. We conclude that the trial court correctly held that appellant's title under the will extended only to the center line of Lake street.

We have considered the assignments of error that question rulings of the trial court on the admission of evidence, and find no error that would justify a reversal of the order appealed from.

Order affirmed.

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THOMAS J. FLAHERTY v. JOHN TILL.[1]

October 18, 1912.

Nos. 17,753—(126).

Action for deceit — complaint sufficient.

Where one deliberately makes a false representation of a material fact, or as of his own knowledge without knowing whether it is true or false, intending that another shall act upon it, and he does so to his injury, an action for deceit lies. Rule applied, and *held*, that the complaint alleges facts sufficient to constitute such a cause of action.

Action in the district court for Ramsey county to recover $20,100 for personal injuries received through false representations. From an order, Olin B. Lewis, J., overruling his demurrer to the complaint, defendant John Till appealed. Affirmed.

John W. Willis and *Stephen A. Ryan,* for appellant.

McDonald, Bernhagen & Patterson, for respondent.

START, C. J.

This is an appeal from an order of the district court of the county of Ramsey overruling the general demurrer of the defendant, Till, to the complaint in an action for deceit. The complaint is not a model pleading; but, omitting therefrom the verbose and immaterial allegations, and construing it liberally, it alleges, in effect, the ultimate facts following:

The plaintiff, on March 18, 1911, was suffering from irritation of his stomach, and applied to the defendant for advice and treatment, which he undertook to give. Thereupon the defendant, for the purpose of deceiving the plaintiff, falsely and fraudulently made a pretended diagnosis of his condition, and advised him that he was suffering from rheumatism of the stomach, and that the proper and necessary treatment therefor was to cover a large portion of his body with a plaster, which plaintiff is now advised consisted of olive, amber,

[1] Reported in 137 N. W. 815.

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and kerosene oils. The defendant also represented as of his own knowledge to the plaintiff that such treatment would have no injurious effect upon his health, but that it would cure the ailments from which he was then suffering. The defendant at the time of making such representations knew each of them to be false, and made them for the purpose of deceiving the plaintiff and inducing him to submit to the treatment and thereby get his money. The plaintiff believed and relied upon the false representations, and submitted to the proposed treatment, which did not cure him, but, on the contrary, injured his health and severely blistered his body, causing poisonous sores and ulcers thereon, to his damage in the sum of $10,000.

It is to be noted that the gist of the alleged cause of action is not negligence or malice, as counsel for defendant assume in their brief, but fraud. Such being the case, it is unnecessary to refer to the objections made by the defendant to the complaint, which are based upon the assumption that negligence or malice is the gist of the action.

The question, then, is: Does the complaint state a cause of action for fraud? The rule applicable to the question is this: Where one deliberately makes a false representation of a material fact, or as of his own knowledge without knowing whether it is true or false, intending that another shall act upon it, and he does so to his injury, an action for deceit lies. 1 Dunnell, Minn. Digest, § 3818; 20 Cyc. 14; Hedin v. Minneapolis Medical & S. Institute, 62 Minn. 146, 64 N. W. 158, 35 L.R.A. 417, 54 Am. St. 628; Vilett v. Moler, 82 Minn. 12, 84 N. W. 452.

The defendant's counsel seek to distinguish the Hedin case on the ground that in that case money was obtained from the plaintiff by the fraud, while in this case the complaint does not allege that any money was obtained from the plaintiff by the alleged deceit. The injury to one's person by the fraud of another is quite as serious as an injury to his pocketbook, and the case cited, which clearly states and illustrates the rule, is here directly in point. Testing the allegations of the complaint by the rule stated, and construing them liberally, but without applause, we are of the opinion, and so hold, that they state facts sufficient to constitute a cause of action.

Order affirmed.

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CHARLES N. ORR and Others v. WILLIAM SUTTON.[1]

October 18, 1912.

Nos. 17,864—(19).

Redemption by junior mortgagee — unpaid registry tax.

A mortgage upon real property, upon which the registry tax imposed by chapter 328, Laws 1907, has not been paid, though erroneously recorded by the register of deeds, furnishes no sufficient legal basis in the mortgagee for the redemption from the foreclosure of a prior mortgage upon the same property, as against the holder of the title under that foreclosure.

Effect of record.

The record of such a mortgage, being prohibited by the statute and thereby declared invalid for any purpose, is not evidence of the fact that it was duly recorded, or of the validity of the instrument.

County treasurer's certificate not conclusive.

A certificate upon the back of such a mortgage, made by the county treasurer, before the same was recorded, that the mortgage was not subject to the tax, *held* not to conclude the holder of the title to the property under the prior foreclosure.

Case followed.

Mutual B. L. Ins. Co. v. County of Martin, 104 Minn. 179, sustaining the constitutionality of the statute referred to, followed and applied.

Pleading — passage of act — answer stricken.

An answer alleging the failure of the legislature properly to enact the statute *held* without merit, and the order striking it out is sustained.

Action in the district court for St. Louis county to quiet title to certain real property. From an order, Dancer, J., sustaining plaintiffs' demurrer to a portion of the answer of William Sutton and from an order striking out a portion of his answer, he appealed. Affirmed.

J. N. Searles, for appellant.

William G. White and *Theodore Hollister,* for respondent.

[1] Reported in 137 N. W. 973.

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BROWN, J.

Action to quiet title to certain real property. It comes to this court on defendant Sutton's appeal from an order sustaining a demurrer to one of the defenses set up in his answer, and an order striking out another separate defense as sham and frivolous.

The facts, so far as necessary to an understanding of the questions presented, are as follows: William Sauntry was the owner of an undivided interest in the property, and mortgaged the same to Weyerhauser & Rutledge to secure the payment of an indebtedness amounting to $30,000. The mortgage was duly recorded, and was subsequently assigned, and by the assignee duly foreclosed; the sale on foreclosure taking place on September 20, 1910. During the period of redemption several judgments were recovered and docketed against Sauntry, the mortgagor, one of which was assigned to plaintiffs in this action, under which they duly redeemed from the mortgage foreclosure. Plaintiffs' title to the land is founded upon this redemption.

The facts relating to the title asserted by defendant Sutton, as appears from the pleadings, are as follows: The period of redemption from the mortgage sale expired September 20, 1911. Late in the evening of that day Sauntry, the mortgagor, executed to defendant Sutton a mortgage upon the property to secure the payment of the sum of $50. The mortgage was filed for record in the office of the register of deeds at 10:05 o'clock p. m. of that day. Immediately thereafter Sutton filed a notice of intention to redeem from the prior foreclosure. He thereafter paid to the sheriff of the county an amount claimed to be sufficient to effect redemption, and the sheriff in turn executed and delivered to him a certificate of redemption. Defendant Sutton claims title to the property under and by virtue of this redemption.

To overcome this claim plaintiffs allege in their complaint that the Sutton mortgage, as well as the record thereof, was invalid and a nullity, furnishing no sufficient basis for Sutton's attempted redemption, for the reason that the registry tax imposed by Laws 1907, p. 449, c. 328, was never paid. In response to this charge in the complaint defendant Sutton answered as follows: "Further answering,

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this defendant avers that the mortgage aforesaid so executed and delivered by said Sauntry to this defendant on the twentieth day of September, 1911, was duly presented to the treasurer of St. Louis county, Minnesota, for his indorsement as required by the so-called law of this state, being chapter 328, General Laws of 1907, and said officer duly indorsed the same with the words 'Exempt from registration tax,' and duly attached thereto his official signature as such treasurer, and thereupon said mortgage was duly recorded in the office of the register of deeds in and for said county as aforesaid, but no registration tax was paid to said treasurer, although this defendant was ready and willing to have paid such tax, had such treasurer demanded the same, or declined to have indorsed said mortgage without such payment." To these allegations plaintiff demurred, as not constituting a defense.

Defendant Sutton also alleged in his answer: "Moreover, this defendant avers that said so-called law, being chapter 328, General Laws 1907, was not then or ever a valid law of this state, for the reason that the same was never voted upon or read in the senate of this state, when the same—being known as House File No. 561—was under consideration in the legislature of this state." These allegations were stricken out on motion.

1. The question presented by the demurrer involves the legal right of defendant Sutton to redeeem from the prior foreclosure, and the effect of his attempt to do so. If the mortgage registry tax statute be construed in harmony with its plain language, and force and effect given it accordingly, the question is not at all difficult to answer. The right of redemption after foreclosure is purely statutory, and the conditions prescribed as essential to the right as granted to a junior mortgagee or other creditor having a lien upon the property must appear of record before it may be exercised. Our statutes provide (Section 4481) that, if the mortgagor makes no redemption, the creditors of the mortgagor having a lien upon the property, or some part thereof, legal or equitable, may redeem in the order stated therein. To entitle a creditor to redeem as a matter of legal right, it is necessary that he have some interest in or lien upon the land which, either at law or in equity, gives him the right to protect his interest in the

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specific property, or to have it appropriated in satisfaction of his claim to the exclusion of all others. Nelson v. Rogers, 65 Minn. 246, 68 N. W. 18; Whitney v. Burd, 29 Minn. 203, 12 N. W. 530. Section 4482 contemplates that such lien, when in the form of a subsequent mortgage, shall be of record, and the provisions thereof require the production to the officer to whom the redemption money is paid of a certified copy of the record, and either the original mortgage or a certified copy of the same. Sutton was the holder of a subsequent mortgage, and as such claimed the right to redeem. If his mortgage was a legal and valid instrument, and was properly recorded, beyond question he was in position to exercise the asserted right. If it was not a valid instrument, or properly recorded, he had no vested right to have the mortgaged property applied to its payment, to the exclusion of those who had valid liens of record. The question turns, then, upon the validity or invalidity of the mortgage and the record of the same.

It is insisted by plaintiff that, because the registry tax was not paid, neither the mortgage nor the record thereof, though filed and recorded under the mistaken impression that the registry tax statute had no application to mortgages under $100, was of any validity for any purpose, and furnished no foundation for the Sutton redemption. This brings us to that statute, and the force and effect to be given its provisions. It imposes upon every mortgage executed upon real property in this state a tax of fifty cents for each $100, or major fraction thereof, of the principal debt or obligation secured. Section 7 of the act provides: "No such mortgage, no papers relating to its foreclosure, nor any assignment or satisfaction thereof shall be recorded or registered * * * unless said tax shall have been paid; nor shall any such document, or any record thereof, be received in evidence in any court, or have any validity as notice or otherwise." Under the rule heretofore adverted to, the Sutton mortgage, to constitute a sufficient basis for the right of redemption, must appear to have been valid as a matter of law, and properly of record, and such as to clothe Sutton with the right to resort to the specific property for the enforcement of his debt against all others. In other words, it must appear to have been a lien upon the property which all other credit-

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ors were bound to respect. Did his mortgage constitute such a lien? The question must be answered in the negative.

Defendant contends: (1) That, though the tax was not paid, the mortgage nevertheless was valid between the parties, vesting in Sutton a lien upon the property; and (2) since it was recorded in fact, though prohibited by law, the validity of the record cannot be questioned by plaintiffs. Neither of these contentions can be sustained.

In our view of the principal question, it is not material whether the mortgage was valid as between the parties or not. The mere existence of a valid mortgage does not give the holder thereof the right of redemption as against prior or subsequent lienholders. To complete the right as against third persons, the mortgage must be of record, and evidence thereof produced to the officer when redemption is made. Sutton's mortgage was recorded in fact, but in violation of law. It was not entitled to record, and the statute declares that such a record shall have no "validity as notice or otherwise." Neither the mortgage nor the record thereof could be received in evidence to establish the right of redemption, for the statute further expressly provides: "Nor shall any such document, or any record thereof, be received in evidence in any court." Clearly Sutton had no lien upon the property which he could enforce as against third persons, and his attempted redemption was invalid and of no effect. Tweto v. Horton, 90 Minn. 451, 97 N. W. 128; Cogan v. Cook, 22 Minn. 137. That one who has redeemed from such a foreclosure may contest the validity of a lien under which a subsequent redemptioner claims the right to redeem has often been decided by this court. Brady v. Gilman, 96 Minn. 234, 104 N. W. 897, 1 L.R.A.(N.S.) 835, 113 Am. St. 622; Hughes v. Olson, 74 Minn. 237, 77 N. W. 42, 73 Am. St. 343. So that, since Sutton had no lien upon the property, valid as to third persons, it is not important that his mortgage may have been valid as against the mortgagor.

Nor does the indorsement made by the county treasurer upon the mortgage, that it was not subject to the tax, change the legal aspect of the case. Such certificate does not conclude either the state or plaintiffs. The statute must be construed as a revenue law, and force and effect given to all its provisions. The tax thereby imposed is defi-

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nite and certain; the amount in each particular case being a matter of computation. Nothing is left to the decision of the county treasurer, and his conclusion that a particular mortgage is not subject to the tax is of no force or effect. His indorsement on the mortgage in question "Exempt from taxation," in no way changes the rights or liabilities of the parties. Thorp v. Merrill, 21 Minn. 336. The case of Forest Lake State Bank v. Eckstrand, 112 Minn. 412, 128 N. W. 455, was an equitable proceeding, not involving the rights of third persons, and is not here in point.

This covers all that need be said upon this branch of the case. We have treated the questions presented from the standpoint of the legal rights of the parties, and have passed without consideration counsel's argument dealing with asserted equitable features of the case. If there be any equitable matters of a nature to relieve Sutton, they may be presented on the trial of the action; but they are not here involved.

2. The statute was held constitutional in Mutual B. L. Ins. Co. v. County of Martin, 104 Minn. 179, 116 N. W. 572, and was held to apply to mortgages of less than $100 in State v. Fitzgerald, 117 Minn. 192, 134 N. W. 728. The questions involved were fully considered in those cases, which we follow and apply without further discussion. The additional point made in the case at bar, namely, that the statute is unconstitutional because it does not impose the tax uniformly upon all members of the class of mortgages included within its provisions, or assess the tax in accord with the actual value of the security, is not sustained. The reasoning of the court in the Martin County case sufficiently covers the point, and requires no further discussion.

3. We are of opinion, and so hold, that the allegations of the answer to the effect that the statute was not legally enacted were properly stricken out. Our examination of the legislative journals, of which the court takes notice, discloses nothing fairly tending to sustain the claim that the statute was not read in the Senate before passage as required by the Constitution, or to overcome the presumption that it was regularly enacted. State v. City of Hastings, 24 Minn. 78; Miesen v. Canfield, 64 Minn. 513, 67 N. W. 632.

Orders affirmed.

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SLEEPY EYE MILLING CO. v. CHICAGO & NORTHWESTERN RAILWAY COMPANY.[1]

October 18, 1912.

Nos. 17,922—(65).

Carrier — conversion of freight — settlement with consignor.

Action by a consignee against a carrier for damages for unreasonably delaying the transportation of a carload of coal, and for a conversion of the coal. *Held*, upon the facts stated in the opinion, that a settlement with the consignor is not a defense to the action.

Action in the district court for Hennepin county to recover $86.35. The substance of the pleadings is stated in the opinion. The case was tried upon stipulated facts before Holt, J., who made findings as set forth in the opinion. From the judgment entered pursuant to the findings, defendant appealed. Affirmed.

Brown, Abbott & Somsen, for appellant.

Fred N. Furber and *Kerr & Fowler,* for respondent.

START, C. J.

This action was brought in the district court of the county of Hennepin to recover damages for the negligent delay of the defendant, as a common carrier, in transporting a carload of coal, and for a conversion of the coal after it arrived at its destination.

The complaint alleged two causes of action in separate counts; the first of which purported to allege a cause of action based on the delay of the defendant in transporting the coal, whereby the plaintiff sustained damages in loss of profits on the coal in the net sum of $26.69; and the second one alleged a conversion of the coal by the defendant after it reached its destination, to the plaintiff's net damage in the sum of $59.66. No objection to the complaint for

[1] Reported in 137 N. W. 813.

Note.—As to right of consignee to maintain action against carrier, see note in 36 L.R.A.(N.S.) 68.

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misjoinder of causes of action was taken either by demurrer or answer.

The answer put in issue the allegations as to the first alleged cause of action, and as to the second one it admitted the conversion, and alleged a settlement therefor with the consignor of the coal and payment of the damages, as authorized by the statutes of the state of Illinois, where the contract for transportation was made. The answer alleged a counterclaim, amounting to $10, for demurrage of the car of coal.

The cause was tried by the court without a jury. The parties entered into a written stipulation of the facts, and thereby agreed that the cause be submitted to the court and tried upon the facts so stipulated. Thereupon the trial court made the stipulation a part of its findings of fact, and found the facts to be as stated in the stipulation. As a conclusion of law from the facts found, the court ordered judgment for the plaintiff in the sum of $76.35. It was so entered, and the defendant appealed from the judgment.

The stipulation of facts was allowed and certified as the settled case, which was unnecessary, for the facts stipulated are a part of the findings of the trial court. The sole question, then, presented by the record for our decision, is whether the facts so stipulated and found sustained the conclusion of law and the judgment. There can be no question here made as to a misjoinder of causes of action, for it was waived by failing to raise it by demurrer or answer. Nor does the record present any question of the sufficiency of the complaint, for all questions presented by the stipulation and findings are presumed to have been litigated by consent. This eliminates several questions discussed in the briefs of counsel.

The only question, then, meriting special consideration, is whether the record shows that the plaintiff was entitled to recover for a conversion of the coal.

The short facts relevant to this question are these: The plaintiff, a retail dealer in coal at Sleepy Eye, this state, purchased the coal in question of Keller & Company, at Sesser, Illinois, which was there to be delivered to plaintiff free on board the car, and the purchaser was to pay the charges for freight. Keller & Company, as

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consignors, delivered the coal in a car to the Burlington Railroad Company to be transported to Peoria, Illinois, and there delivered to the defendant, a connecting line, to be transported by it to Sleepy Eye and delivered to the plaintiff, the consignee. The consignor received the bill of lading and forwarded it to the consignee, the plaintiff, who paid to the consignor the purchase price of the coal. The defendant did not transport the coal to Sleepy Eye within a reasonable time, but unduly delayed the shipment. When the coal reached its destination, the plaintiff was notified; but it refused to unload the coal, unless the defendant would pay its damages due to the delay in the delivery thereof. Thereafter the defendant took the coal for its own use, and settled with and paid the consignor therefor, claiming the right so to do by virtue of the laws of Illinois, to the effect that the consignor has a sufficient interest in the subject-matter of a shipment to maintain an action for and recover for loss, damage, and conversion thereof, regardless of the ownership of the same, and is chargeable as trustee for the consignee to the extent of his interest therein. Upon the conversion of the coal by the defendant, the plaintiff advised Keller & Company of such fact, and requested it to refund the purchase price of the coal and to enter a claim against the defendant therefor. The request was not complied with, and no refund was made. On May 17, 1910, the plaintiff made a direct demand upon the defendant for settlement of its claim, by letter, in which the defendant was informed that plaintiff paid Keller & Company for the coal on February 16, 1910, and also advised Keller & Company of its action and revoked its previous request. Thereafter, and on May 19, 1910, the defendant paid Keller & Company $59.66 as a full settlement of all claims and demands of the plaintiff by reason of all matters growing out of the shipment of the coal. It does not appear that the defendant had notice of the revocation of the request made to Keller & Company to refund and present its claim to the defendant, other than may be inferred from the fact that the plaintiff presented its claim direct to the defendant and notified it that full payment for the coal had been made to Keller & Company.

It is clear, upon a consideration of these facts, that the plaintiff

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was the owner of the coal when it was converted, and that the consignor had no interest therein. Benjamin v. Levy, 39 Minn. 11, 38 N. W. 702; Grinnell-Collins Co. v. Illinois Cent. R. Co. 109 Minn. 518, 124 N. W. 377, 26 L.R.A.(N.S.) 437.

If it be conceded that by the laws of Illinois the consignor might have maintained an action for the benefit of the plaintiff, the conclusion does not follow that the defendant had a right to settle with the consignor and discharge the cause of action of the plaintiff after the defendant had due notice that the coal had been paid for, that it then belonged to the plaintiff, and that its claim for damages had been presented to it. Any right which the consignor may have had to bring the action for the plaintiff's benefit was not exclusive, and the plaintiff, as the real party in interest, had the right to enforce its claim by action or otherwise as it might be advised.

We therefore hold, upon the special facts of this case, that the settlement of the plaintiff's claim with the consignor is not a defense to this action.

Judgment affirmed.

HOLT, J., having tried the case in the court below, took no part.

LOUIS G. JOHNSON v. JAMES FORRESTAL and Another.[1]

October 18, 1912.

Nos. 17,598—(20).

Personal injury — recovery for mental anguish.

In this, an action to recover damages for personal injuries, it is *held:*

1. There was no reversible error in the instruction to the jury, the giving of which is assigned as error.

[1] Reported in 137 N. W. 1095.

Note.—For mental suffering arising from contemplation of disfigurement or mutilation as element of damages for personal injuries, see note in 15 L.R.A. (N.S.) 775.

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2. Conceding, but not deciding, that there can be no recovery in a personal injury case for mental anguish or humiliation arising solely from a deformity or disfigurement that is not discoverable except when the person is exposed, it is *held* that this question is not raised by an exception, after the jury retires, to an instruction that the "permanent deformity" suffered by plaintiff was proper to be considered.

3. The damages are not excessive.

Action to recover $10,090 for personal injuries, tried in the district court for Ramsey county. The facts are stated in the opinion. The complaint alleged that plaintiff's injuries were directly caused by the negligence of defendants in permitting the feed water pipe to be and remain improperly and insecurely attached to the boiler. The answer denied that the escape of steam from the boiler and injury to plaintiff were caused by negligence on the part of defendants, or from any defect in the boiler and piping of which defendants were aware or could, in the exercise of reasonable diligence, have ascertained. The case was tried before Olin B. Lewis, J., and a jury which returned a verdict in favor of plaintiff for $2,900. From an order denying their motion for a new trial, defendants appealed. Affirmed.

Morton Barrows, for appellants.

Samuel A. Anderson and *A. F. Storey,* for respondent.

BUNN, J.

This is a personal injury case in which plaintiff recovered a verdict for $2,900. Defendant appealed from an order refusing a new trial.

Defendant concedes that the case was for the jury and that the evidence justifies a verdict for plaintiff, but urges errors in the charge and excessive damages.

Plaintiff, a young man of twenty-two, was working for defendants as fireman upon a dredge and was very severely scalded while attempting to make an adjustment of one of the parts attached to the boiler used to operate the engine. In a hole in the side of the boiler, the walls of which were threaded, a "reducer" was screwed; into this reducer was screwed a pipe about a foot long, at the outer

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end of which was a valve, and an "injector" coupled to the pipe. It became necessary to remove the injector and substitute another, while the boiler was in use. In doing this work the reducer came out of the boiler, allowing steam and hot water to be blown from the boiler, seriously scalding plaintiff. The contested issue on the trial was as to whether the reducer came out because it had not been screwed into the boiler plate so as to engage all the threads or a sufficient number to make the connection reasonably safe, as claimed by plaintiff, or whether the accident was due to a latent defect in the reducer, as contended by defendant.

Counsel for defendant, while admitting that the evidence on this issue made a clean question for the jury, and while expressing his "hearty accord with the attitude of this court upon the question of granting new trials for breaches of technical rules in the admission of testimony or in the instruction of juries," insists that there were errors in the charge in the case at bar of a nature to make it appear reasonably probable that an injustice has been done. If counsel is right in his estimate of the character of these errors, his conclusion that a new trial should be granted is sound. But we are not impressed with the serious nature of the errors, or rather inaccuracies, pointed out. The charge as a whole was clear and fair. We fail to perceive how the jury could have misunderstood the issue. We have carefully considered each portion of the charge assigned as error, and the charge as a whole, but consider it unnecessary to particularly mention but one matter. As to the others, while there are some inaccuracies, we find no reason for not applying the salutary rule of this court so approved by the able counsel for defendant.

The matter alluded to as meriting special consideration is the giving of the following instruction on the question of damages. "It is proper for you to consider *the permanent deformity* which the plaintiff has suffered, as appears from the undisputed evidence in the case, and its character and extent."

The position of defendant is that damages for mental anguish or humiliation, resulting solely from the disfigurement of the person, are not recoverable because such mental anguish is considered a sentimental state of mind and too remote from the original injury to

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constitute an element of damages. This question is not ruled either way by any decision of this court, and the authorities elsewhere are in conflict. It is true that plaintiff's deformity or disfigurement was not visible when he was clothed, and the question under such circumstances is not free from doubt. But we think that this question is not properly before us on this appeal. In the first place it requires an effort to construe the instruction quoted as defendant construed it. The court did not directly say that the jury could consider mental anguish, distress of mind or humiliation resulting from the disfigurement, but simply said that it was proper to consider the *permanent deformity of plaintiff*. When analyzed, it is probable that this can mean nothing but mental suffering, resulting from the deformity, but it does not seem likely that it would be so understood by the jury, especially in view of the absence in the record of any attempt to show such mental suffering. If counsel was apprehensive that it might lead the jury to consider and allow damages for mental distress, it was his duty to call the attention of the court to the point and give an opportunity for a more explicit instruction. Instead of this, no request was presented, and no exception taken to the instruction given until after the jury retired. We hold, under the circumstances, that the question argued by counsel in his brief, is not fairly presented by the record, and that there was no error in the instruction that defendant can take advantage of here, conceding that damages for mental suffering arising from a disfigurement of the person that is not discoverable save when the person is voluntarily exposed, are not recoverable. This question we do not decide.

It is urged that the damages awarded, $2,900, are excessive. Plaintiff's injuries were serious and undoubtedly extremely painful, and the evidence warranted a finding that he would suffer pain in the future. It is true that his condition at the time of the trial was such that any allowance for diminution of earning capacity for the future was not justified. But considering the loss of wages before the trial, the character and extent of the injuries, and the pain, we are not prepared to say that the sum awarded is so excessive as to justify our interference after the trial court has approved it.

Order affirmed.

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WILLIAM C. FOSTER v. LEE W. COCHRAN.[1]

October 25, 1912.

Nos. 17,640—(26).

Description of government subdivison in tax certificate — evidence.

A description of land in a tax proceeding is sufficient if it so describes the land that the owner thereof and all persons interested in it, if of ordinary intelligence, may identify it with reasonable certainty. Evidence of extrinsic facts is admissible to apply the description and identify the land. The usual way of identifying a government subdivision of land, or a lot in the platted portion of a village or city, is by reference to the official survey and plat thereof.

Description sufficient.

Rule applied, and *held*, that a description in a tax proceeding of lot 6 in a designated government section as the northwest quarter (N. W. ¼) of the northeast quarter (N. E. ¼) of the same section is sufficient.

Action in the district court for Morrison county to determine adverse claims to certain real estate. The case was tried before Taylor, J., who made findings of fact and conclusions of law as stated in the opinion. From an order denying his motion for judgment in his favor notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

E. A. Kling, for appellant.

William G. White, for respondent.

START, C. J.

Appeal by defendant Cochran from an order of the district court of the county of Morrison denying his motion for a new trial in an action brought pursuant to R. L. 1905, § 972, to quiet plaintiff's title, based upon a tax certificate, to the land here in question.

The complaint described the land as situated in the county of Morrison and known as the northwest quarter (N. W. ¼) of the north-

[1] Reported in 137 N. W. 968.

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east quarter (N. E. ¼) of section eighteen (18), township one hundred thirty-one (131), range twenty-nine (29), according to the government survey thereof. The answer alleged that the defendant was, and had been since August 11, 1903, the owner of the land attempted to be described in the complaint as the northwest quarter (N. W. ¼) of the northeast quarter (N. E. ¼) of section eighteen (18), but that there was no land in the county of Morrison legally so known or described, and, further, that the true description of such land was lot six (6) of the section named. The reply put in issue the allegations of new matter in the answer, and alleged that the land described in the complaint and answer were the same.

It was admitted on the trial on behalf of the defendant that there were no defects in the tax proceedings by virtue of which the plaintiff claimed title to the land, other than the alleged defect in the description of the land in such proceedings. The government map or plat of the survey of township 131, range 29, was received in evidence, which showed that the land which ordinarily would be known and designated as the northwest quarter (N. W. ¼) of northeast quarter (N. E. ¼) of section eighteen (18) was designated on such plat as lot five (5), containing .55 of an acre, and lot six (6), containing 39.45 acres. The two constituted the northwest quarter (N. W. ¼) of the northeast quarter (N. E. ¼) of section 18, and the whole thereof. The plat and other evidence received on the trial show that lot 5 was then a part of the reservation of Fort Ripley. The evidence also showed that the land in question was patented to the defendant's remote grantor as lots 5 and 6 of section 18, and that by mesne conveyance he acquired the record title to lot 6. Evidence was also received, over the objection of defendant, that the land in question was, for many years before he acquired any interest therein and ever since, described on the assessment rolls of the county and in all tax records and proceedings as the northwest quarter (N. W. ¼) of the northeast quarter (N. E. ¼) of section eighteen (18), and that the land had been sold, mortgaged, and conveyed under such description.

The trial court found the facts to be as follows: "That lot six of section eighteen, in township one hundred thirty-one of range

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twenty-nine, described in the answer of defendant, Cochran, is included within and a part of the northwest quarter of the northeast quarter of said section eighteen, described in plaintiff's complaint, and that the plaintiff is the owner in fee simple thereof, and that defendant has no right, title, estate, or interest therein."

As a conclusion of law the trial court found that the plaintiff was the owner in fee simple of the northwest quarter of the northeast quarter of section eighteen, township one hundred thirty-one, range twenty-nine, and that the defendant had no title to or interest therein, and directed judgment accordingly.

The defendant assigns several alleged errors as to the rulings of the court in the admission of evidence; but none of them is urged in the brief, and they are waived.

The findings of fact are clearly sustained by the evidence, if the description of the land in the tax proceedings was sufficient to identify it. The only question, then, presented by the record for our decision, is whether the facts found by the trial court sustain its conclusion of law; that is, whether the description of the land in the tax proceedings was sufficient to identify it. The rule applicable to this question is this: A description of land in tax proceedings is sufficient if it so describes the land that the owner thereof and all persons interested in it, if of ordinary intelligence, may identify it with reasonable certainty. Evidence of extrinsic facts is admissible to apply the description and identify the land. The usual way of identifying a government subdivision of land, or lot in the platted portion of a village or city, is by reference to the official survey and plat thereof. National Bond & Security Co. v. Board of Commrs. of Hennepin County, 91 Minn. 63, 97 N. W. 413.

Applying this rule to the facts of the instant case, there can be no fair doubt as to the sufficiency of the description in the tax proceedings, for no man of ordinary intelligence could examine the government survey and plat without being clearly advised that lot 6, and the whole thereof, of section 18, was included within and was a part of the northwest quarter of the northeast quarter of the same section.

The cases of Keith v. Hayden, 26 Minn. 212, 2 N. W. 495, and

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Knight v. Alexander, 38 Minn. 384, 37 N. W. 796, 8 Am. St. 675, cited by defendant, are not in point, for they are cases where the description of the land was inherently defective, and described no particular tract of land. We hold that the description of the land in the tax proceedings was sufficient.

Order affirmed.

FIRST STATE BANK OF MOUNTAIN LAKE v. C. E. STEVENS LAND COMPANY and Another.[1]

October 25, 1912.

Nos. 17,643—(24).

Principal and surety — release of surety.

A stipulation for an affirmance of an order or judgment appealed from, made in good faith, does not release the surety on the appeal bond.

Appeal bond — construction.

In an action, findings were made directing judgment to be entered in favor of the plaintiff therein, the stay allowed had expired, and plaintiff threatened to enter judgment, whereupon the defendant promised that if plaintiff would refrain from entering judgment in the intended appeal, defendant would gave a satisfactory bond to pay all judgments and costs that might be entered in the action. If it be proven that such an agreement was made and kept by plaintiff, and pursuant thereto an appeal bond was executed, the bond is a valid common-law obligation and binding in all its terms.

Indefinite findings — reversal.

In order to determine the prejudicial effect of errors properly assigned, the whole record may be examined, and if, in the light thereof, the findings appear indefinite and uncertain on a vital issue, the judgment should not be allowed to stand.

Statute of frauds.

The bond in this case considered as a common-law obligation is not void

[1] Reported in 137 N. W. 1101.

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under the statute of frauds for failure to state the consideration, namely, the alleged agreement in full.

Effect of amended complaint.

An order sustaining a demurrer to a complaint is of no effect as determining the law of the case after the service of an amended complaint.

Action in the district court for Cottonwood county against the C. E. Stevens Land Company and the Title Guaranty & Trust Company, to recover $3,264.79 upon a bond. The facts are stated in the opinion.

The amended complaint, among other matters, alleged that through mistake in drafting the bond and in the execution thereof, in each of the places where the date of the bond and execution thereof appeared, the word "November" was used instead of the word "December;" that the instrument was in fact executed December 3, 1904; that the agreement entered into before the delivery of the bond and in consideration therefor was that Hiebert, assignor of plaintiff, was to refrain from entering judgment in the district court in his favor, as had been ordered by the district court in its order, during the pendency of the appeal, and in consideration of said bond being executed and delivered he did refrain from entering said judgment in the district court until after the appeal was determined in the supreme court. The amended complaint also set up that the defendant land company was solvent at the date of the execution of the bond, but since that date became and remained insolvent and had no property from which the judgment could be collected.

The answer to the amended complaint denied the bond was executed on December 3, 1904, or at any other time than the date thereof, and denied specifically the allegations in the complaint set out above.

The case was tried before Nelson, J., who made findings and as conclusion of law ordered judgment in favor of defendant. From the judgment entered pursuant to the order, plaintiff appealed. Reversed and new trial granted.

Wilson Borst and *J. G. Redding,* for appellant.

James E. Markham and *Benjamin Calmenson,* for respondent.

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HOLT, J.

The action is to recover on an appeal bond. Judgment was rendered for the defendant, the surety, and plaintiff appeals therefrom.

Plaintiff's assignor, one J. C. Hiebert, in an action pending in the district court against C. E. Stevens Land Company, was successful, and findings directing judgment to be entered in his favor for $5,050 were duly made and filed September 22, 1904. A stay of proceedings for twenty days was granted the next day, but none other. A motion for a new trial was denied November 26, and December 5, 1904, a notice of appeal was served. On that day the attorney for the Land Company delivered to the attorney for said Hiebert the bond in suit for $6,000, executed by said Land Company, as principal, and this respondent as surety. After stating that an appeal from the order denying a new trial had been taken, the bond reads:

"Now, therefore, if the said The C. E. Stevens Land Company aforesaid, shall pay all costs that may be awarded against it and all damages sustained by the respondent in consequence of said appeal, and abide and satisfy the judgment or order which the appellate court may give therein, and pay all judgments and costs which may be rendered against it in said action, then this obligation shall be void, otherwise to remain in full force."

The order appealed from was affirmed and upon remittitur to the district court judgment was entered upon the findings. Plaintiff now seeks to recover of the defendant, the surety on the bond, the balance unpaid on the judgment. The surety pleaded and the court found that the affirmance of the order appealed from by the C. E. Stevens Land Company in this court was pursuant to a stipulation between the parties. Plaintiff herein saved exception to the reception of the stipulation in evidence, and also assails the finding upon that issue as immaterial. The defendant contends that this finding is not only material, but conclusive that no liability exists on the bond.

There are authorities to the effect that an affirmance of an appeal by active consent of the litigants releases the surety, or precludes the happening of the implied condition precedent to liability on the bond, namely, that the appeal shall be heard on its merits; that,

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by stipulating for affirmance of the appeal, a condition not contemplated is added to the contract of the surety and he is released; and that the surety in assuming the contract has a right to rely on the chance that he will be relieved from liability if the appellate court considers the appeal on the merits, therefore, when the litigants, by agreement, take away this chance, he is not to be holden. Johnson v. Flint, 34 Ala. 673, where, however, the stipulation disposing of the appeal without a hearing was for the entry of a different judgment than the one appealed from.

Long v. American, 146 N. Y. 251, is also relied on by defendant. In that case the stipulation in the court of appeals was for a judgment reversing the decision of the supreme court and reinstating the judgment of the trial court; the circumstances of the stipulation savored of fraud upon the surety. However, the court does not place its conclusion on that ground, but on the ground that the affirmance of the original judgment was not an affirmance within the true meaning of the bond. The court makes use of this language: "The question of fraud or collusion is not presented. But it seems difficult to escape the conviction that the purpose of the arrangement was to subject the defendant to liability on its undertaking. None of the cases on the construction of bonds indemnifying against suits or judgments, or upon appeal bonds, which have come to our attention, presents the peculiar feature of this case, of a consent by a party who has succeeded on the appeal taken by him to a reversal of the judgment in his favor and to a restoration of the original judgment against him." While the facts may thus differentiate this case cited from the case at bar, the principal announced sustains the defendant's contention. See also Large v. Steer, 121 Pa. St. 30; Baker v. Frellsen, 32 La. An. 822; Andre v. Fitzhugh, 18 Mich. 93.

We are, however, not inclined to the views taken in the foregoing decisions. The surety on an appeal bond has no voice in the conduct of the litigation, nor any interest in the matters involved. It is understood that the appeal is for the sole benefit of the principal in the bond. He alone has the right to carry on or terminate the appeal in the manner he chooses, if not prevented by his adversary or the court. Therefore, if at any time he concludes that continuing

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the litigation will be of no advantage to him, or will entail useless expense, he should have the right to stipulate for an affirmance or dismissal of the appeal without thereby releasing the surety on the bond. All authorities are agreed that intentional neglect of an appellant to take the steps necessary for a consideration of the appeal on the merits does not affect the liability of the surety on the appeal bond. And what is such neglect but doing by indirection what was here accomplished by the stipulation? We are of opinion that the right of a litigant to terminate litigation, and which should be favored by courts, is an incident annexed to bonds on appeal, so that when this right is exercised in good faith it does not in anywise release the surety on the bond. We do not here consider a case where the parties have colluded to work a fraud on the surety, for the stipulation for affirmance appears to have been prompted by a laudable desire to avoid certain defeat for one of the parties and needless trouble and expense for the other.

As supporting the rule we adopt, see Chase v. Beraud, 29 Cal. 138; Drake v. Smythe, 44 Iowa, 410; Ammons v. Whitehead, 31 Miss. 99; Bailey v. Rosenthal, 56 Mo. 385; Howell v. Alma, 36 Neb. 80. We therefore conclude that it was error to receive the stipulation to affirm and that the finding based thereon, if given any legal value, will result in a wrong judgment.

Since no judgment was entered in the court below when the bond was given, and since on this trial no evidence was offered to show that the financial standing of the obligor in the bond had changed for the worse during the pendency of the appeal, the contention of the defendant is that plaintiff is not in any event entitled to recover. It claims this was a statutory cost and supersedeas bond given on an appeal from an order; therefore the condition of the bond to pay the judgment to be entered under the order is without consideration, and must be regarded as mere surplusage. If the bond was given to secure only the rights given by statute, the contention is correct. Johnson v. Dun, 75 Minn. 533, 78 N. W. 98; Proprietors v. Mussey, 48 Me. 307; Kountze v. Omaha Hotel Co. 107 U. S. 378. But plaintiff claims that the bond was given pursuant to a voluntary agreement entered into between the obligor and obligee therein

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to the effect that the latter should refrain from entering the judgment to which he was then entitled, the stay having expired, upon receiving such a bond as would have been required to stay proceedings had the judgment been entered. The weight of authority supports the proposition that where an appeal bond is not in the express terms of the statute, it may be valid as a common-law obligation voluntarily entered upon by the parties. Johnson v. Dun, supra; Slutter v. Kirkendall, 100 Pa. St. 307; Smith v. Fargo, 57 Cal. 157; Gardner v. Donnelly, 86 Cal. 367; Mix v. People, 86 Ill. 329; Meserve v. Clark, 115 Ill. 580; Coughran v. Sundback, 13 S. Dak. 115; Coughran v. Hollister, 15 S. Dak. 318.

In Pray v. Wasdell, 146 Mass. 324, the court says: "But it is unnecessary to decide whether the contract is valid under the statute, for if not, it is binding at common law. It was entered into voluntarily, it contains nothing in conflict with the statute, and it is not otherwise illegal. Obligors who sign such an instrument are bound by it."

Upon the issues made by the pleadings and the findings, defendant insists that the bond is statutory. There is no express finding to that effect. The complaint set out the bond and alleged that it was executed according to an agreement between the parties under which the obligee was to refrain from entering the judgment pending the appeal, and that he so did. The answer admitted that the bond was executed in the form and manner set out in the complaint, and further on specifically denied the paragraph in the complaint in which the allegations of the agreement were contained. On the trial the court received the evidence showing the agreement, but reserved ruling on the objection made thereto. The record shows that upon final consideration the objection was sustained. Manifestly this was prejudicial error unless the court regarded the admission of the answer as to the manner in which the bond was executed as including an admission of the agreement, in which case the bond would not be a statutory obligation. We are, however, precluded from predicating a reversal on the ruling, for no assignment of error is based thereon. But we feel justified in examining the record for

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the purpose of determining the meaning of the findings and the prejudicial effect of the errors assigned.

It is clearly shown that the obligor in the bond did not cause it to be approved by the court commissioner, nor file it with the clerk. This was done by plaintiff's attorney after the bond was delivered to him. The findings apparently to the contrary are assailed and, we think, justly so, if any inference is to be drawn therefrom that the bond is statutory. Had the court not rejected the testimony showing the bond to be given pursuant to the voluntary agreement of the parties, it could be said, perhaps fairly, that the findings must be considered as inferentially determining that issue in favor of the defendant herein. But to draw such an inference now in the light of the record would seem to work an injustice upon plaintiff. The pleadings, trial and findings leave the issue in doubt as to whether the bond was intended as a statutory supersedeas, or as a voluntary agreement by and between the litigants, and as such, a good common-law bond. We therefore conclude that a new trial ought to be had. Had there been a definite finding that the bond was given solely pursuant to statute, the error in regard to the stipulation first above discussed could not have changed the result. But such not being the case, plaintiff is in a position to claim prejudicial error.

The point made that the bond is not a good common-law obligation, because it does not comply with the statute of frauds in that it fails to state the consideration or agreement, we do not consider of sufficient merit for discussion.

Respondent also claims that because the court sustained a demurrer to the original complaint which set out this bond in haec verba on the ground that no damages from the stay were alleged, and appellant acquiesced in such order by serving an amended complaint alleging such damages, therefore it is the law of the case that the bond is a statutory supersedeas bond on appeal from an order. We do not concur in this view. The service of an amended pleading takes the place of the former pleading and stops all further use thereof. Pleins v. Wachenheimer, 108 Minn. 342, 122 N. W. 166; Hanscom v. Herrick, 21 Minn. 9; Cook v. Kittson, 68 Minn. 474, 71 N. W. 670. Had the demurrer been overruled, the objection that the com-

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plaint did not state a cause of action would still have been open to defendant at the trial.

Our conclusion is that the judgment should be reversed and a new trial granted. So ordered.

PHILIP E. BROWN, J., took no part in the decision of this case.

FRANK MAREK v. M. J. HOLEY.[1]

October 25, 1912.

Nos. 17,705—(43).

Ejectment — location of boundary — new trial.

Action to recover possession of land, to which plaintiff claimed title by reason of a practical location of the boundary line, acquiesced in by the parties; also by adverse possession. Verdict for the defendant, and a new trial was granted, on the ground that the verdict was not justified by the evidence. *Held*, that the evidence was not so manifestly in favor of the verdict that it was error to grant a new trial.

Action in the district court for Le Sueur county to recover possession of a certain strip of land and $100 damages for its retention. The complaint alleged that in June, 1888, all the owners of the lands located in the section mentioned in the opinion united in having the same surveyed and the boundaries of each tract established; that by such survey the east boundary line of government lot 2 was duly established and agreed to by Joseph Marek, the owner of that lot, and the owners of the land lying directly east thereof; that immediately after the completion of the survey he took possession thereof, and remained in actual, open, continuous and exclusive possession of the same under claim of title thereto until January 31, 1898, when he conveyed the same to plaintiff, who took immediate possession of the lot and of the whole thereof, as established by the survey, and remained in actual, open, continuous and exclusive possession

[1] Reported in 137 N. W. 969.

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thereof until the month of October, 1910, when defendant wrongfully took possession of a strip of plaintiff's land along the east side thereof, more particularly described in the complaint. The answer specifically denied the foregoing allegations of the complaint, and alleged that the true and correct boundary line between the lands as established by the United States government survey thereof was well known and marked upon the ground, and denied that at the time of the commencement of the action, or at any time, defendant was attempting to or did enter upon the land not owned and occupied by him, and within his true boundary line as established by the United States government survey thereof.

The case was tried before Morrison, J., and a jury which returned a verdict in favor of defendant. Plaintiff moved for judgment in his favor notwithstanding the verdict or for a new trial. The motion for judgment was denied, and the motion for a new trial granted. From the order granting a new trial, plaintiff appealed. Affirmed.

Moonan & Moonan, for appellant.

Charles C. Kolars, for respondent.

START, C. J.

This action was brought in the district court of the county of Le Sueur to recover possession of a strip of land, varying in width from thirteen to twenty-three feet, in section 25, town 111, range 24, which is particularly described in the complaint herein. It is undisputed that the defendant owns the land adjoining the strip in controversy on the east, and that the plaintiff owns the land adjoining it on the west.

On the trial of the case there was evidence on the part of the plaintiff tending to show that in 1888 a survey was made of the line between the tracts of land respectively adjacent to the strip, that the line as surveyed was indicated and marked on the ground, that the parties thereafter recognized and treated such line as the true boundary line, and that it showed the strip in question was a part of the plaintiff's land. There was also evidence on behalf of the defendant tending to show that such line was not correct, and was never so-

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treated by the parties, and that a subsequent and correct survey showed that the tract was a part of the defendant's land. The plaintiff also claimed the strip by adverse possession. The trial court submitted the respective claims of the parties to a jury, and a verdict was returned for the defendant. Thereupon the plaintiff made a motion for judgment notwithstanding the verdict or for a new trial, on the ground that the verdict was not justified by the evidence. The trial court denied the motion for judgment, and made its order granting the motion for a new trial on the ground stated. The defendant appealed from the order.

The sole question presented by the record is whether the evidence was so manifestly and palpably in favor of the verdict that it was an abuse of discretion for the trial court to grant a new trial. It is the contention of the defendant that the evidence is conclusive that the strip of land in question is in fact within the original boundaries of the land adjacent thereto which he owns. This may be conceded for the purpose of this appeal only. If, however, there was a practical location of the land by the parties, which was acted upon by them for such length of time as to bar a right of entry under the statute of limitations, or by the express agreement of the parties, which was mutually acquiesced in, or if the plaintiff was in the adverse possession of the strip for fifteen years, the defendant is not the owner of the land in dispute, nor entitled to its possession.

The record discloses evidence tending, in some degree, to show a practical location of the boundary line in accordance with the survey made in 1888, and also that the plaintiff and his father, through whom he claims, had been in the adverse possession of the land for more than fifteen years before the commencement of the action. It is true, as counsel for defendant claims, that to constitute title by adverse possession there must have been an intention on the part of the possessor to claim title against the true owner; but we do not concur in the further contention that the evidence is conclusive that the plaintiff did not so intend, for what his intention was in this respect, as disclosed by his testimony, was fairly a question for the jury.

It is also claimed that the plaintiff cannot tack the possession of

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the land of his grantor, his father, to his own to make the fifteen years of alleged adverse possession, because the land in dispute was not included in the description of the land in the deed. To make out adverse possession of land, so as to bar an action for its recovery, the possession of several successive holders may be tacked together; but privity between them is essential. Such privity exists between two successive holders, when the later takes under the earlier by descent, will, or grant, or by a voluntary possession. 1 Dunnell, Minn. Digest, § 117.

There was evidence in this case tending to show that the plaintiff received possession of the disputed strip on the delivery of the deed to him by his father. Our conclusion, based upon a consideration of all of the evidence, is that the preponderance of the evidence is not so palpably in favor of the verdict as to indicate any abuse of discretion by the trial judge in granting a new trial.

Order affirmed.

CARL LINDQUIST v. MARGARET A. YOUNG and Others.[1]

October 25, 1912.

Nos. 17,727—(61).

Findings not contradictory.

In the erection of a flat building plaintiff agreed to do all the carpenter work for $1,400, the owner to furnish the material; the court found a substantial performance, although there were omissions in the work which would require $37.25 to complete. *Held*, that considering the contract price and the character and detail of the work performed, the finding that defects and omissions amounted to $37.25 is not contradictory of the finding of substantial performance, which finding is amply sustained by the evidence.

Mechanic's lien.

Where the owner of premises, upon which improvement is to be created,

[1] Reported in 138 N. W. 28.

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for which the statute gives a right to a mechanic's lien, contracts with the mechanic for personal supervision and temporary store or tool-houses in connection with the work he undertakes, the mechanic is entitled to claim a lien for the whole contract price.

Attorney's fee.

The allowance of fifty dollars for attorney's fees as costs by the court is reasonable, and the statute permitting such allowance is constitutional.

Trial — permitting lien claimant to intervene.

No prejudice resulted to the owner from the order compelling another lien claimant to intervene after plaintiff's cause was tried and before entry of judgment, for it was open to the owner to suggest to the court at the trial of plaintiff's action that such lien claimant ought to be made a party as contemplated by section 3517, R. L. 1905.

Mechanic's lien — evidence.

The evidence sustains the findings as to the right of the intervener to a lien for the amount therein stated.

Same — pleading and proof.

A statement in a lien filed, as to a matter not required to be stated, does not prevent the lien claimant from pleading and proving the facts where no one has been misled by such statement.

Rulings on evidence.

Rulings on admission and exclusion of evidence examined and held to show no reversible error.

Action in the district court for Hennepin county to recover $615.55 and to foreclose two mechanic's liens for that amount upon a certain city lot. The answer admitted the filing of the lien statements, alleged that plaintiff failed to fulfil his contract in accordance with the plans and specifications, wasted and appropriated materials of the value of $250, and prayed for judgment for $750.

The case was tried before Booth, J., who, when plaintiff rested, denied defendant's motion to dismiss the action and made findings of fact and as conclusion of law ordered judgment in favor of plaintiff for $578.30, and for $50 as an attorney's fee for the foreclosure of the liens, and directed that the liens be foreclosed by a sale of the property.

Thereafter the Bruce-Edgerton Lumber Company obtained an order to show cause why it should not intervene as a lien claimant

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and, after hearing, was made a party defendant and filed its answer to the complaint, setting up a lien claim for $184.69. The case was reopened for the purpose of admitting testimony in support of the claim of the lumber company. The court made findings and as a conclusion of law ordered judgment in favor of the defendant Bruce-Edgerton Lumber Company in the sum of $148.36, co-ordinate with the judgment in favor of plaintiff, and that the amount be paid out of the proceeds of the sale equally with the judgment of plaintiff. From an order denying Margaret A. Young's motion for a new trial, she appealed. Affirmed.

Margaret A. Young and *E. P. Evans,* for appellant.

John N. Berg, Adolph E. L. Johnson and *John A. Sweeney,* for respondent.

HOLT, J.

Judgment was entered for plaintiff and intervener in this action to foreclose mechanic's liens. The defendant, owner of the property, appeals from the order denying her motion for a new trial.

For the sum of $1,400 plaintiff agreed to perform all the carpenter work required in the construction of an apartment house which appellant, as owner, was building, she to furnish all material. She let to various persons other parts of the construction, and procured the materials needed from different sources. During the progress of the work disputes arose between plaintiff and the appellant as to the manner of doing it, appellant finally refusing to make the last payments on the claim that plaintiff had not fulfilled the contract. After an exhaustive trial, the court found that there had been a substantial performance of the contract, but allowed appellant $37.25 for certain omissions and plaintiff $15.55 for work in addition to that called for by the contract. Appellant insists that plaintiff failed to prove his case; therefore the court erred in refusing to dismiss when plaintiff rested, and erred in finding that there had been a substantial performance of the contract.

No useful purpose would be served by a discussion of the evidence. A careful examination thereof leads to the conclusion that the finding of substantial performance is abundantly sustained. Ap-

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pellant argues that because the court finds that the reasonable value of completing those parts of the contract which plaintiff had omitted was $37.25, there was not a substantial performance. She says $37.25 is a substantial sum, hence a substantial omission. To this we cannot assent. Thirty-seven dollars is relatively a small amount when the contract price, extent and detail of the work in question is considered. Leeds v. Little, 42 Minn. 414, 44 N. W. 309; Hankee v. Arundel Realty Co. 98 Minn. 219, 108 N. W. 842. The finding of substantial performance disposes also of the technical objections raised that plaintiff failed to prove that he had a competent foreman on the job, that he did not guard the material delivered on the premises day and night from being stolen, and some other stipulations contained in the contract.

It is also said the motion to dismiss should have been granted because plaintiff was not entitled to a lien on account of nonlienable items included in the claim. This, if true, would not justify a dismissal, for plaintiff would in any event be entitled to a personal judgment against her for the amount due upon proof of substantial performance. That aside, appellant's contention is not sound, that because it appears that plaintiff was to give personal supervision to the work and was to erect a temporary tool house, a right to a lien is thereby destroyed. No attempt was made to place a value on these items for the purpose of separating them from the admittedly lienable work. But we are of opinion that the personal supervision appellant required of plaintiff or of his foreman is lienable, as well as the work required in the erection of the tool house. From the owner's viewpoint both were necessary items in the improvement contracted for. Few liens could ever be enforced if appellant's theory of the law prevails. Every mechanic must spend some time in sharpening his tools, scaffolds must be provided, etc., but it ought not to be successfully argued that these matters which are necessary, but are not incorporated in the structure itself, are to be excluded from the lien given by a statute enacted for the purpose of assisting those who would otherwise lose the labor or material contributed to the improvement. Such a statute must be liberally and reasonably construed in furtherance of the remedy intended. Coughlan v.

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Longini, 77 Minn. 514, 80 N. W. 695; Howes v. Reliance Wire-Works Co. 46 Minn. 44, 48 N. W. 448.

The allowance of $50 for attorney's fees to plaintiff in the costs fixed is challenged as unreasonable, and as being granted under the provision of a statute which is unconstitutional because it is class legislation. The statute sanctions an agreement for $50 attorneys' fees for the foreclosure of a mortgage of no greater amount than plaintiff's lien. And we venture to say that no lawyer of any standing will say that $50 is more than a reasonable fee for foreclosing a lien of $578, where there is a vigorous defense put up necessitating several days' trial. The argument that since the intervener was allowed only $10 for attorneys' fees, wherein the trial consumed almost as much time, therefore $50 to plaintiff is unreasonable, is not convincing. We think no one will pretend that the $10 is reasonable or adequate for the services rendered by the attorney in intervener's case. This being so, appellant has not the proper premise for her conclusion. The court undoubtedly took into consideration the fact that the intervener's lien was only $148, and that it, perhaps, ought to have spared appellant some inconvenience by coming into the action before plaintiff went to trial. No extended argument is made on the unconstitutionality of the act, (R. L. 1905, § 3517) authorizing the court to fix costs and disbursements. That this statute permits the allowance of expenses for attorneys' services by way of costs has been held in Schmoll v. Lucht, 106 Minn. 188, 118 N. W. 555, and as at present advised, the constitutional objection raised by appellant is answered by the decision in Cameron v. Chicago, M. & St. P. Ry. Co. 63 Minn. 384, 65 N. W. 652.

We find no prejudicial error in the order permitting the intervener to come in after plaintiff has tried his case, but before entry of judgment. True, the lis pendens was on record when the intervener filed its lien. It ought to have intervened at once. But appellant had also the right to bring the intervener into the action, and undoubtedly, upon her mere request, the court would have declined to try plaintiff's action until those who had filed liens were made parties. The law contemplates that all lien claimants should be parties to the final judgment. Section 3517, R. L. 1905.

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The intervener sold the lumber for which the lien is claimed directly to appellant. One estimate had been delivered on the premises before plaintiff took the contract to do the carpenter work. At appellant's request he furnished an estimate as to the lumber needed. Appellant claims that it was agreed, when she bought the lumber of intervener specified in this second estimate, that what it had delivered under the first estimate should be checked off from the second. The intervener contends that only part was to be taken out. Appellant admits ordering some lumber from intervener in addition to the estimates. Plaintiff had authority to direct intervener when to deliver the lumber in the second estimate. He was also, for a time, delegated by appellant to order certain extra lumber, but after some disputes arose between them in regard to his work, this authority was revoked. All these matters presented pure questions of fact bearing upon the amount and value of the lumber sold and delivered to appellant by the intervener for the erection of her building. And the record furnishes no reasonable basis for any claim that the court allowed any amount whatever in the lien for lumber not proven to have been actually sold and furnished for the erection of appellant's building.

There is nothing in the contention that there is a fatal variance between intervener's lien statement which states that the amount therein specified was the reasonable value of the materials and the findings of the court that as to the main part the sale was for an agreed price, for the law does not require the lien statement to indicate either that the lien is claimed under a contract price or that it is based upon an implied contract for the reasonable value.

A mere inspection of the record will show that the errors assigned upon the rulings of the court in receiving or excluding evidence, as well in the trial of plaintiff's as in intervener's case, are either entirely without merit or could not possibly prejudice. The appeal presents thirty-one assignments of error and in the discussion of these appellant's 228-page brief suggests numerous technical points upon which prejudicial error is predicated. To discuss or even mention all would give undue length to this opinion. We have attentively

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examined them, and find nothing therein calling for a reversal of the learned trial court's conclusions.

The order appealed from is therefore affirmed.

STATE ex rel. WILLIAM H. MASON v. CONSUMERS POWER COMPANY.[1]

October 25, 1912.

Nos. 17,757—(9).

Public service corporation — discrimination between customers.

A public service corporation, which has accepted a franchise from a city authorizing it to operate therein, is bound by the implication of the law to make no unreasonable discrimination between those to whom service is or is not to be furnished; that is, it must not be partial and must serve all alike who are similarly circumstanced with reference to its system, or who are members of any class which it has undertaken or is otherwise bound to serve.

Public service corporation — eminent domain.

A corporation organized to supply electric service to the cities of the state and the inhabitants of such cities, is a public service corporation within the rule above announced; especially in view of R. L. 1905, § 2927, giving such a corporation the right to use the highways of the state for the purpose of constructing its lines, and of the fact that such service is a public service in aid of which the power of eminent domain may be exercised.

Mandamus — evidence.

Evidence in mandamus to compel an electric light company to furnish electric service to relator's house considered, and *held* to show that such house was situated within a zone of service already established by the respondent, and was therefore prima facie entitled to the same service furnished to other houses within the same zone.

Making connection with customer's property.

The court will judicially notice that when an application is made to a public service corporation for a public service such as water, gas, electric light or power, or telephone service, certain things have to be done in order

[1] Reported in 137 N. W. 1104.

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to connect the applicant's premises with the company's system, and that the company, and not the applicant, usually attends to such matters, except in so far as they may be controlled by special rules and regulations applicable to the particular service.

Same — by stringing wires in streets and alleys.

The court will judicially notice that cities are divided by streets and alleys into blocks and subdivisions of blocks; that public service corporations using wires for the distribution of the service supplied by them, such as telephone and electric-light service, customarily set poles in the streets and alleys and string wires along and across the same; that such wires frequently cross the streets and alleys; that many persons are served by such wires so strung above and across the streets and alleys; and when the consent of the city is necessary in order that the service company may lawfully set such poles and string such wires as may be necessary to carry the service to the persons so served and to be served, the company, and not its patrons or applicants for service, usually attends to the obtaining of the necessary consent of the city to the use of the streets, by application to the council or otherwise.

Presumption as to custom — applicant's right to writ of mandamus — burden of proof.

In the absence, therefore, of evidence of a contrary custom, in mandamus proceedings to compel the furnishing of service, it will be presumed that the respondent, an electric-light company, follows the usual custom and itself performs the details incident to the connection of its lines with the premises of applicants for service; and hence where it appears that an applicant for service, whose house is in an established service zone, has made proper application and demand upon the respondent and has his house equipped to receive the service, his right to the writ is prima facie established; the burden of establishing a contrary custom being upon the respondent, as is also the burden of establishing any defense predicated upon its inability, through physical, legal, financial, or other obstacles, to furnish the service demanded.

Unreasonable discrimination.

It is unreasonable discrimination for an electric-light company to require an applicant for service to procure for it a right of way to his premises, when such condition is not imposed upon other applicants and patrons.

Condition in franchise.

A provision in an ordinance granting a franchise to an electric-light company, that the city should not require the company to make "extensions" except upon certain conditions, *held* not to affect the right of a resident in an established service zone to invoke the aid of the courts to compel the company to connect his premises with its line.

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Same.

Such provision held not to affect the mutual rights and obligations of the company and the individual residents of an established service zone.

Mandamus the proper remedy.

Mandamus is the proper remedy to compel a public service corporation to furnish service to an individual applicant therefor.

Tenor of writ.

The mandate of a writ of mandamus to compel an electric-light company to furnish electric service to the relator, should, under the established facts herein, be merely that the respondent must furnish such service, without specifying the details or manner in which such duty is performed.

Upon petition of William H. Mason the district court for Ramsey county issued its alternative writ of mandamus, directed to the Consumers Power Company, commanding it to connect relator's dwelling house with its service wires constructed in the vicinity of the house; that such connection be made through the alley in block 10 of Macalester Park, or by such other authorized route as respondent might select, and that respondent furnish and supply to relator electric current sufficient to light his house in the usual and ordinary manner in like houses, or show cause why it had not done so. The answer alleged that the distance from the property occupied by relator to the nearest pole connected with the electric light wires belonging to respondent was more than three hundred feet, exclusive of street crossings; that the pole was located in the alley in block 10 of Macalester Park and was the only point from which respondent could string wires and convey electricity to the house of relator; that, in order to reach the house of relator, the wires would of necessity cross and be strung over Amherst street, and a pole would of necessity be placed therein; that respondent had no proper permission or authority from the common council of the city of St. Paul for the erection of such pole or for the stringing of wires upon or across Amherst street, and that relator had made no application to the common council for such order, and no order had been made by the common council directing respondent to continue its lines in conformity with section 8 of the ordinance.

The matter was tried before Hallam, J., who made findings and as

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conclusion of law quashed the writ. From an order overruling relator's motion for judgment on the findings or for amendment of the findings and conclusion of law, and from an order denying a motion for a new trial, he appealed. Reversed.

William H. Mason, pro se.

Denegre & McDermott, for respondent.

PHILIP E. BROWN, J.

Mandamus to compel the respondent to furnish electric service to the relator's residence in the city of St. Paul. An alternative writ was issued but, after hearing had and upon findings made, such writ was quashed; whereupon from an order denying the relator's motion for a new trial, prayed for on the grounds that the court erred in overruling the relator's motion for judgment upon the findings or for amended findings and judgment thereon, the relator appealed.

1. The respondent is, and during all the times hereinafter mentioned has been, a corporation duly organized and existing under the laws of this state, with power to generate, distribute, and supply electric current for light, heat and power, and other purposes, to the cities of the state and the inhabitants of such cities, and by virtue of certain ordinances is and, at all times material to the issues involved in this case, has been authorized to carry on its said business in the city of St. Paul. Being a corporation organized and empowered to perform a public service, and having accepted a franchise from the city authorizing it to operate therein, it is bound by the implication of the law to make no unreasonable discrimination between those to whom the said service is to be furnished; that is, it must not be partial and must serve alike all who are similarly circumstanced with reference to its system or who are members of any class to which it has undertaken or is otherwise bound to furnish service. State v. Board of Water & Light Commrs. of Duluth, 105 Minn. 472, 117 N. W. 827; Minnesota Canal & Power Co. v. Koochiching Co. 97 Minn. 429, 450, 107 N. W. 405.

This is the rule almost universally applied to telephone companies (State v. Board of Water & Light Commrs. of Duluth, supra; State

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v. Citizens, 61 S. C. 83, 85 Am. St. 870, 55 L.R.A. 139; Chesapeake v. Baltimore, 66 Md. 399, 59 Am. Rep. 167; Central v. Falley, 118 Ind. 194, 10 Am. St. 114, and note), water companies (Haugen v. Albina, 21 Ore. 411, 14 L.R.A. 424), gas companies (State v. Board of Water & Light Commrs. of Duluth, supra; City v. Rushville, 132 Ind. 575, 15 L.R.A. 321, and note), and electric-light companies (Snell v. Clinton, 196 Ill. 626; Cincinnati v. Village, 57 Oh. St. 336, 41 L.R.A. 422; Schmitt v. Edison, 110 N. Y. Supp. 44); and while the rule has never been applied in this state specifically to electric-light companies, we feel no hesitancy in applying it to such companies, especially in view of R. L. 1905, § 2927, giving them the right to use the highways of the state for the purpose of constructing their lines, etc., and of the decision in Minnesota Canal & Power Co. v. Koochiching Co., supra, and of the fact that such service is a public service in aid of which the power of eminent domain may be exercised. Moreover, section 4 of the ordinance by which the respondent is authorized to exercise its corporate franchises in the city of St. Paul provides that the respondent "shall at all times during the life of this franchise (the franchise to operate in the city), furnish and supply electricity to all customers and applicants without discrimination and at reasonable rates," and "shall at all times during the life of this franchise, use and exert every reasonable effort to continuously furnish an ample supply of electricity to all of its patrons along its entire system and all enlargements and extensions thereof."

Unquestionably, then, it was, and is, the respondent's duty to supply, without discrimination, electric service to all citizens of St. Paul whose property is so situated as reasonably to entitle them thereto under the ordinance, and under the general law applicable to public service corporations, and to refrain from unjust discrimination between such citizens. So the next question is: Does the relator come within this class? He claims that he does, on the ground that he is a member of a class rendered determinate by the respondent's own acts, that is, that his residence is within a service zone already established by the respondent; his ultimate claim of a violation of a legal duty due him from the respondent being that it is

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unjust discrimination to deny him the service. Prima facie, at least, we think that this claim is amply sustained by the findings, when the latter are taken together with the undisputed evidence, for it appears that the relator's premises are literally surrounded by residences which are served by the respondent. His residence is on lot 4, block 7, of Elmer & Morrison's Rearrangement of Macalester Park, the lot being on the corner of Geneva and Amherst streets. Seventy-five feet to the north of this lot is Lincoln avenue, across which lies block 5 of the said Rearrangement, and in this block it appears that four abutters on Lincoln avenue are served by the respondent. Likewise the house on lot 3, block 8, immediately across Geneva street, is so served, and also a residence on lot 3, block 10, Macalester Park, diagonally across Amherst street from the relator's lot, and even in the relator's own block 7 a residence to the east of the relator's house is served. In addition to this, it appears that several other residences in the blocks immediately adjacent to block 7 are served; that the respondent actually has a pole and line less than three hundred feet west of the relator's lot, another within the same distance to the south, and a third about two hundred and fifty feet to the east; and that every alley in the blocks to the east, west, and south of block 7 contains one of the respondent's lines from which abutting lot owners are served, there being, however, no alley in block 7 and no line therein, except the individual service wire presumably necessary to connect the residence on lot 2 of this block with the respondent's line in the alley on which such lot abuts on the east. We think, therefore, that it is too clear for argument that the relator is within an established service zone, and, prima facie at least, entitled to the same service accorded to his neighbors.

2. The next question then is: Has the relator done all that he is called upon to do in order to invoke his right to equal service from the respondent?

"The law requires them," said the court in Chesapeake v. Baltimore, 66 Md. 399, speaking of telephone companies, "to be impartial and to serve all alike, upon compliance with their reasonable rules and regulations." It appears that the relator has had his house wired and equipped for the use of electricity, that he has made due appli-

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cation for service, has followed this with a formal demand therefor, and now holds himself ready to comply with any and all lawful conditions that may be imposed by the respondent. Is this not all that is usually considered necessary to be done by one desiring service from a public service corporation of the class to which the respondent belongs?

It is a matter of common knowledge that when an application is made by an individual for service from such a company, such as for water, gas, electric light or power, or telephone service, certain things have to be done in order to connect the applicant's premises with the company's system, and we think that it is equally well known that the company, and not the applicant, usually attends to such matters, except in so far as they may be controlled by special rules and regulations applicable to the particular service. Now the respondent makes no claim that the relator has failed to comply with any of its special rules or regulations. It does not even appear that the respondent has any such. It admits the relator's application and demand, and that his house is equipped to receive the service, and yet refuses to furnish it, basing such refusal flatly and, aside from the question as to the effect of a provision of the franchise ordinance as to extensions, hereinafter considered, solely upon the ground that the relator has not procured for it a right of way to his premises.

More specifically stated, the claim is that, in order to reach the relator's premises without crossing private property belonging to others, a line must be strung across Amherst street and possibly Geneva street, and that probably a pole will have to be set in one of these streets; that the franchise ordinance makes the city's consent a condition precedent to the right to do these things or either of them; that no such consent has been obtained; and hence that the respondent cannot be compelled to furnish the service to the relator. The respondent's contention is that this consent must be obtained by the relator before he can insist upon being served by the respondent, or at least it must appear that the respondent has the right to string a wire over these streets and, if necessary, to set poles therein. In our view of the case, however, the obtaining of whatever consent that may be necessary in order to authorize the respondent to string

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the wires and set the poles as above indicated, is a matter which must be attended to by the respondent and with which the relator has no direct concern. In other words, the consent of the city, if necessary, is merely one of the incidental details involved in the performance of the respondent's ultimate duty to furnish light to those properly applying therefor. These matters, as we have already noticed, are usually looked after by the public service companies, and not by the applicants for service.

More specifically it is a matter of common knowledge, and hence proper to be judicially noticed, that cities are divided by streets and alleys into blocks and subdivisions of blocks, the blocks and subdivisions thereof being very generally owned by private individuals and the streets and alleys being subject to a public use and under the police control of the municipality; that public service companies using wires for the distribution of the service supplied by them, such as telephone and electric-light companies, customarily set poles in the streets and alleys and string wires along and over and across the same; that such wires can be strung only a few hundred feet in any direction without crossing a street or an alley, even where the line is strung upon poles set upon a private right of way; that many persons are served by these wires or lines that are thus strung along and across the streets and alleys as above stated; and that when the consent of the city is necessary, in order that the company may lawfully set such poles and string such wires as may be necessary to carry the service to the persons so served or to be served, the company, and not its patrons or applicants for service, attends to the obtaining of such necessary consent by application to the council or otherwise, and it is to the company, and not to its numerous patrons, that the permission is granted and the permits issued.

Such, then, being the general custom, the question is at once suggested as to whether this custom was followed by the respondent in its dealings with its patrons generally throughout the city and particularly in the service zone involved in this case, or rather the question is whether there is any evidence in the case of a different custom; for in the absence of such evidence the general custom would be presumed to obtain, and the relator's prima facie case would, thus

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far at least, remain unrebutted, the burden of establishing the different custom manifestly being upon the respondent after the relator's showing that he had complied with all the usual and customary conditions imposed upon applicants for service of this kind. But upon the record before us there can be but one answer to this question, for there is no suggestion in either the pleadings or the evidence to indicate that the respondent has ever followed any other than the general custom, or, until now, has ever attempted to place upon any of its patrons the burden of obtaining for it a right of way to their premises. On the contrary, there is evidence that it has followed the usual custom; for the resolution of permission, required by the franchise ordinance, to use the alleys in which the respondent's lines are strung in the service zone here involved, was directed to the Northern Heating and Electric Company, the respondent's predecessor, and not to its patrons, and the application to the commissioner of public works for permits in this same connection was also made by the respondent's predecessor and the permits were issued to the latter. There is, furthermore, evidence that such has been the regular custom of these two companies in obtaining such permits whenever needed.

In addition to this, it appears that the respondent's lines cross Amherst street, in this same service zone, twice, and it does not appear that any patron now being served was required to obtain the city's permission for such crossings. There was evidence that no permission was obtained specifically with regard to these crossings, and the relator attempted to introduce other evidence to the same effect. Such evidence was offered, however, solely for the purpose of showing that the city's consent was not necessary in order to legalize the stringing of wires across these streets—a question not material in our view of the case—and hence the propriety of the court's rejection of this evidence need not now be considered.

In the absence, then, of evidence of a contrary custom, it must be held, upon this record at least, that the respondent has not required other patrons and applicants to procure for it a right of way upon and across the streets necessarily used or crossed in carrying the service to them, and that such is not the respondent's usual custom.

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And it follows that in requiring this of the relator the respondent has discriminated against him. Cincinnati v. Village, 57 Oh. St. 336; Snell v. Clinton, 196 Ill. 626. In the Ohio case above cited difference in rates was held to be discrimination, and in the Illinois case it was held that it was discrimination to require one applicant to pay for the converter used in connection with the service supplied to him, when other patrons were not subjected to similar charges.

We have not adverted to the feasibility of reaching the relator's premises by way of an underground conduit, although it appears that the consent of the city to this method of construction is not necessary under the terms of the franchise ordinance. Nor have we discussed the question of the respondent's right to employ its power of eminent domain in order to obtain a right of way over any private property that it may be necessary to cross in order to give the relator the service applied for by him, though it appears that by such a right of way the relator's premises could be reached from the respondent's nearest pole to the east thereof and less than two hundred fifty feet distant therefrom, without crossing any street or alley. With regard to these matters, it is sufficient to say that they are in the same category with the matter of right of way upon or across the streets with overhead wires. With the possibility or feasibility of any one or more of these methods of bringing the service to him, the relator has nothing to do; nor can he dictate the manner in which his premises are reached. These are matters which the respondent has the right to determine for itself, and must determine; and if each of these ways of carrying the service to the relator was barred by insurmountable difficulties, whether legal or physical or financial, the burden was upon the respondent to show such fact, and to sustain this burden there must, of course, be some showing of a bona fide attempt to reach the relator with the service and a failure thereof, or else proof of the futility of such an attempt. It affirmatively appears that the respondent has made no attempt to get permission to cross the street with its overhead wires, and there is no evidence of the nonfeasibility of an underground crossing. There is some evidence of an attempt to secure a right of way over private property, but it is wholly insufficient. Certainly the respondent cannot be allowed

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to urge its failure to perform its incidental duty of at least attempting to obtain a right of way to the relator's premises, as a defense to its failure to perform its ultimate duty to furnish service.

3. The respondent's only other contention is that the relator has mistaken his remedy, in that his petition should have been addressed to the city council and not the court. Section 8 of the franchise ordinance, says the respondent, required the relator to make application to the city council to compel an "extension" of the respondent's lines; but we do not think that this section stands in the way of a writ to compel the respondent to do its duty, and this aside from any question as to whether such section conflicts with the respondent's statutory obligations. This section, after providing that "the grantee shall from time to time extend any of the electric lines which are now or may be hereafter maintained or operated under this franchise, for the conduct of electricity upon any street or portion of street in said city, within six months after being ordered so to do by the common council," provides further that the common council shall have no power to require such extension to be made unless there shall first be presented to it a petition signed by residents upon the street upon which the extension is to be made, and "provided further that there shall be an average of one of such houses or buildings for every one hundred feet of underground extensions so required to be made, exclusive of street crossings, and an average of one of such houses or buildings for every three hundred feet of overhead extensions, exclusive of street crossings," the months of December, January, February, March and April to be excluded "in computing the time within which such extensions must be made."

Assuming for the moment that this provision of the franchise ordinance affects the relations and the mutual rights and obligation of the company and its individual patrons, its effect upon the case before us would depend upon the meaning of the word "extension" as used therein. Counsel for the respondent assumes that the line necessary to reach the relator's premises would be an "extension;" but to this we cannot agree. We think it apparent that the relator's premises may be reached with a mere subsidiary line, and we are satisfied that such lines are not "extensions" within the purview of

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section 8 of the ordinance. It would be an unwarranted construction of this section to hold that it requires every applicant for service within an established service zone to apply to the council in order to obtain service connections. The fact that in some cases the company could, under the terms of the ordinance, delay its compliance with an order for an "extension" eleven months, is alone sufficient to show the impracticability of any such construction of the word "extension." We are satisfied that section 8 of the ordinance referred to does not apply to mere subsidiary connections of consumers' premises with the respondent's system.

Furthermore, we think it apparent from the ordinance itself that section 8 has no application to the present case. Section 2 provides that the grantee shall within eighteen months from the date of its acceptance of the ordinance "construct and install the necessary poles, wires, conduits, conductors and other appurtenances so as to supply customers with electricity for use in all property and buildings that may desire the use thereof, along the streets of said city for a distance of at least five miles, and in addition to the requirements for extensions hereinafter contained, said grantee shall so construct and install at least an additional three miles each year for a period of two years," etc. Is it not manifest that the word "extension" as here used means extension of the system? So, also, section 4 provides that proper service shall be given "to all of its patrons along its entire system and all enlargements and extensions thereof." Besides section 8, these are the only other places in which the word "extension" occurs; and we think that, taking the three sections together, it is clear that section 8 contemplates extensions of the system or service zones, and does not purport to affect the sufficiency of the service within an established service zone.

But we do not think that section 8 of the ordinance was intended to affect the mutual rights and relations of the company and the individual consumers. Before this franchise ordinance was enacted the respondent's predecessor, and so the respondent, had no right whatever to maintain its system in the city of St. Paul. R. L. 1905, § 2927. Its right, therefore, to operate in the city is derived from the franchise ordinance, and by such ordinance such right is sub-

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jected to certain conditions, among which is the provision of section 8, that the city may require "extensions" of the respondent's lines to meet the necessities of the natural growth and expansion of the city; but this condition is, in turn, qualified by the proviso that the city shall not require such "extensions" except upon the petition of a certain number of prospective patrons, and the sole purpose of this proviso is, we think, to protect the company from an unreasonable exercise of the otherwise arbitrary and unlimited right of the city, under the conditions imposed by the ordinance, to require "extensions," without regard to any benefit to the company. We do not deem it necessary to pass upon the question as to what extent the city could have relieved the company of its statutory duty to perform its functions as a public service corporation. We merely hold that by this ordinance no attempt has been made either to enlarge or restrict such duty. The ordinance simply gives permission to operate in the city, subject to certain conditions operative between the company and the city as such, and leaves untouched the duties of the company, as a public service corporation, to its patrons and applicants for service, except in so far as section 4 expressly declares the already existing duty of the company to furnish reasonable service without discrimination.

Aside from the effect of section 8 of the ordinance, mandamus is unquestionably the proper remedy; and since, as we have held above, this section is not applicable in the instant case, the respondent's contention that the relator has mistaken his remedy cannot be sustained.

It is but fair to the respondent to state that in the court below and also in this court, the respondent's position, as, in part, stated by it, is that, "if there is any possible way by which this court can issue this mandamus order and we can serve the plaintiff in this case, we are willing to comply with that order. We have no desire to deprive plaintiff of electric service which he requires." But such willingness, however much to be commended, is no defense, and was not, indeed, asserted as such. And the respondent having failed to meet the prima facie case made out by the relator, it follows that the relator is entitled to relief. Where the respondent in mandamus to compel the furnishing of a public service fails to establish its affirma-

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tive defense, the relator, if he has made out a prima facie case, is entitled to the writ. Schmitt v. Edison, 110 N. Y. Supp. 44, 45; State v. Citizens, 61 S. C. 83. The trial court, therefore, erred in denying the relief sought, and the erroneous theory of the case which underlay such denial also manifestly led the court into the error of denying the relator's motion to amend findings 4, 7, 11 and 12, as prayed, for the matters sought by such requests for amendment to be injected into the findings were established by practically undisputed evidence, and were material to that theory of the case which seems to us to be the proper one, and pursuant to which we have reached the conclusions above indicated.

The relator is entitled merely to a writ—based upon amended findings as above stated—ordering the respondent to furnish him with electric service, within such reasonable time at the court below may fix, after hearing had for the determination of that question only, without direction as to manner in which the respondent shall perform its duty in such regard. State v. Board of Commrs. of Renville County, 83 Minn. 65, 69, 85 N. W. 830.

Order reversed with direction to proceed in accordance with this opinion.

JOHN LIIMATAINEN v. ST. LOUIS RIVER DAM & IMPROVEMENT COMPANY.[1]

October 25, 1912.

Nos. 17,768—(63).

Maintenance of dam — former judgment bar to action.

Where the plaintiff, in an action for damages resulting from an overflow caused by the backing up of the water from the defendant's dam, so framed his complaint that he was restricted to proof of certain specific acts as having caused such backing up and overflow, the cause of action was nevertheless predicated upon the defendant's violation of his ultimate duty to

[1] Reported in 137 N. W. 1099.

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so conduct and maintain its dam as not to violate the rights of the plaintiff, whose lands lay further up the river; and hence a judgment in favor of the defendant in such action was a bar to a subsequent action between the same parties for the same relief sought in the former action, though the allegations of the complaint in the second action were sufficiently broad to admit of proof of any and all specific acts or omissions of the defendant in violation of its ultimate obligation to the plaintiff with respect to the maintenance of the dam.

Action in the district court for St. Louis county to recover $900 damages to plaintiff's land alleged to have been caused through defendant's negligent operation of its dam. The answer denied the allegations of the complaint and set up that the action was barred by a former judgment in a similar action between the same parties. The facts are stated in the opinion. The case was tried before Dancer, J., and a jury which returned a verdict in favor of plaintiff for $500. From an order denying defendant's motion for a new trial, it appealed. Reversed.

William B. Phelps, for appellant.

Arnold & Pickering, for respondent.

Philip E. Brown, J.

In order that the questions involved in this case may be understood, it is necessary to set out the controlling facts alleged in considerable detail, and also to follow closely the phraseology of the two complaints hereinafter referred to. These facts are as follows:

In September, 1909, the plaintiff brought an action against the defendant, the allegations of the complaint filed therein being, substantially, that for a long time prior to and likewise since January, 1909, he had been in possession of a certain described eighty acres of land in St. Louis county, occupied by him as a homestead, and a portion of which was in crop during the season of that year; that prior to July 15, 1909, the defendant closed the gates of a certain dam across the said river, which was owned, operated, and maintained by the defendant below the above mentioned land, and

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stopped the flow of water and caused it to accumulate above the said dam to such extent that it ran over the top thereof, overflowed the banks of the river above the same, and that the defendant caused the water to back up in the river and negligently caused it to overflow the said land, because of the defendant's failure to properly manage and regulate the accumulation of water in the dam, and because the defendant negligently caused an unusual and unsafe quantity of water to accumulate therein and to overflow the banks of the river and run across the adjacent lands; that the waters of the river were wrongfully, negligently, and unlawfully forced out of their natural and usual channel, and caused to flow across the lands so occupied by the plaintiff, thereby injuring his crops, etc., to the damage of the plaintiff in the sum of $750, for which amount judgment was demanded. The defendant answered this complaint, admitting its ownership of the said dam and denying all other allegations. In February, 1910, on the trial of the cause to a jury, a directed verdict in favor of the defendant was returned because of the failure of the plaintiff to establish a cause of action; and subsequently judgment was entered for the defendant on this verdict.

After such verdict the plaintiff brought another action against the defendant, alleging in his complaint that he settled upon the land described in the complaint in the first action, prior to February, 1909, and had since been in possession thereof, the same "being a tract of not more than one hundred and sixty acres, consisting of not more than two distinct tracts of land belonging to the United States on which settlement is not prohibited by the general government," and that he had occupied and cultivated the said land for five years and had made improvements thereon prior to the said date exceeding five hundred dollars in value, and then had growing crops thereon. This complaint further alleged the defendant's ownership, operation and maintenance of a dam across the St. Louis river as in the complaint in the former action, and set out that "during the month of July, 1909, and for a long time prior and subsequent thereto, the defendant negligently and carelessly maintained and operated said dam and negligently and carelessly failed and neglected to exercise proper care and supervision of said dam, whereby

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large quantities of water from said St. Louis river were, during said month of July, 1909, diverted from the natural course of said river, over, in and upon the land so occupied by the plaintiff as aforesaid and the defendant did thereby trespass upon and completely submerge the cultivated portion thereof," and injured the plaintiff's crops, etc., to the damage of the plaintiff in the sum of $900, for which judgment was demanded.

The defendant answered this complaint in the same form as in the former action, and in addition thereto set up such former action in bar. By way of reply the plaintiff admitted the bringing of the former action involving the property mentioned in the complaint in the second action, but denied that the same cause of action was set forth in both complaints. The cause was tried to a jury and a verdict was returned in favor of the plaintiff for the sum of $500.

On the trial of the cause the court ruled, in effect, that the judgment roll in the former action was irrelevant and inadmissible in evidence, to which ruling the defendant excepted, and, here, having appealed from an order denying its motion for a new trial, assigns such ruling as error. Some other points have been raised, but the determinative and ultimate question involved is the correctness of this ruling, and this in turn depends upon whether the verdict and judgment in the former action is a bar to the instant case.

It is conceded that the transactions referred to and the relief sought in both actions are the same, and the defendant claims that the proceedings had in the first action constitute an estoppel by judgment against the plaintiff in the present action, and that the latter is barred by the proceedings culminating in the judgment rendered in the former action.

One action only lies to redress a single wrong, or, as frequently expressed, a single tort gives rise to a single cause of action, and a plaintiff cannot be permitted to indulge in unnecessary litigation by splitting up a cause of action and prosecuting more than one suit thereon; the penalty imposed by the law for the violation of this rule being the application of the doctrine of res adjudicata, which doctrine is based upon the legal maxims that "a man should not be twice vexed for the same cause," and that "it is for the public

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good that there be an end of litigation." State v. Torinus, 28 Minn. 175, 9 N. W. 725. This doctrine is well stated by Mr. Justice Field in Stark v. Starr, 94 U. S. 477, 485, as follows:

"It is undoubtedly a settled principle that a party seeking to enforce a claim, legal or equitable, must present to the court, either by pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand, and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There could be no end to litigation if such a practice were permissible."

This declaration of the law is but a composite of our own decisions. Thus, in H. W. Wilson Co. v. A. B. Farnum & Co. 97 Minn. 153, 156, 106 N. W. 342, it is stated: "Where the cause of action is entire and indivisible, the judgment determines all the rights of the parties upon it, although it may be but partially presented to the court. It is the rule that a single cause of action cannot be split up into several suits."

So also in King v. Chicago, M. & St. P. Ry. Co. 80 Minn. 83, 82 N. W. 1113, it is declared: "It has long since become settled in this state that a single, entire cause of action cannot be split up into several suits, and that one recovery, although it be in part recovery for the entire injury, is effectual as an estoppel."

And it might be added that, as such an estoppel must be mutual, and hence that both of the parties to the action must be bound by the judgment, or it will not be a bar in favor of either, a judgment for the defendant under like circumstances will result in the same consequences. Columb v. Webster Mnfg. Co. 84 Fed. 592.

In Stitt v. Rat Portage Lumber Co. 101 Minn. 93, 111 N. W. 948, it was announced that the true test of the constituents of an estoppel by judgment is whether the causes of action are the same; and this is practically the sole question necessary here to be determined, which, of course, involves the consideration of what constitutes a cause of action. The term "cause of action" is defined in King v. Chicago, M. & St. P. Ry. Co. supra, by quoting Mr. Pomeroy's definition. We do not deem it necessary to repeat

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this definition here, for our task is not so much to discuss the nature of causes of action in general as to apply the well-established general principles to the instant case. Suffice it to say, then, that the act or conduct constituting that element of a cause of action which is commonly called the delict, may consist either of a single specific act or omission, or may be the resultant of several acts or omissions or of both acts and omissions, and that in either of the latter cases the singleness and indivisibility of the delict is not affected by the number of the specific occurrences out of which it grows. In other words, a cause of action for wrong is predicated upon the violation of an ultimate duty, and though the performance of such duty may require the doing or omission of many separate and distinct acts, the omission or doing of which would constitute a violation of the ultimate duty, it is nevertheless the violation of the latter, and not the specific acts or omissions, which constitutes the actionable wrong or delict. See Patterson v. Wold, 33 Fed. 791; Texas v. Buckalew (Tex. Civ. App.) 34 S. W. 165; Hueston v. Mississippi & R. R. Boom Co. 76 Minn. 251, 79 N. W. 92; Armstrong v. Chicago, M. & St. P. Ry. Co. 45 Minn. 85, 47 N. W. 459; McCain v. Louisville, 97 Ky. 804; Columb v. Webster Mnfg. Co. supra.

Furthermore, the singleness of a cause of action is not necessarily affected by the variety or severability of the damages suffered. See King v. Chicago, M. & St. P. Ry. Co. supra. Cases to a similar effect might be cited almost without limit, but we deem the above sufficient. In the Armstrong case, supra, the complaint alleged that the plaintiff delivered a mare to the defendant, a common carrier, for carriage, and charged negligence on the part of the defendant in the care of the animal while in its custody, one paragraph alleging negligence while the mare was in the possession of the defendant as carrier, and the other charging negligence after the arrival of the mare at destination and while she was in the defendant's custody as warehouseman. It was held that only one cause of action was alleged. "Although inaccurately so called," said Mr. Justice Mitchell, in delivering the opinion of the court, "the complaint did not state two causes of action, but only one, to-wit, negligence in

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the care of the property, constituting a breach of defendant's contract of bailment." In McCain v. Louisville, supra, an action for injuries caused by the "negligence of defendant's agents in giving an unusual and loud whistle of its engine after plaintiff has crossed the track in safety, and thus frightening the (plaintiff's) horse and causing the injury," was held barred by a judgment against the plaintiff in a former action wherein it was alleged that the plaintiff's horse was frightened by reason of the fact that the "train approached the public road-crossing at a dangerous rate of speed, without giving the usual and customary notice of its approach, whereby the appellant (plaintiff) was decoyed so near the crossing that his horse became frightened," etc.

In Columb v. Webster Mnfg. Co. supra, it was held that a judgment in an action for personal injuries alleged to have been caused by the defendant's negligence was a bar to a subsequent action between the same parties for the same injury based upon the same transaction, though additional acts of negligence were alleged in the second action. It was declared by the court that the complaint in the second action merely alleged "additional acts of negligence, operating upon the same occurrence and tending to the same result."

These cases, and especially the one last referred to, which has been cited and approved many times (see Hein v. Westinghouse Air Brake Co. 172 Fed. 524, 526; Bresnahan v. Tripp Giant Leveller Co. 99 Fed. 280, 283; The New Brunswick, 125 Fed. 567, 569), are, we think, conclusive of the question before us. In each of them the violation of the ultimate duty was held to constitute the delict, as distinguished from the specific acts by which such violation was manifested. And so in the instant case, the ultimate duty of the defendant was so to conduct and maintain its dam as not to violate the rights of the plaintiff, whose lands lay further up the river, and it was the violation of this duty which was alleged in both of the actions here involved, though in the former action the violation was alleged in terms so restricted and specific that, under the rule applied in Scarlotta v. Ash, 95 Minn. 240, 103 N. W. 1025, the proofs were restricted by the court below to the particular, specific

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act of closing the gates of the dam, while in the second action the ultimate duty and its violation were alleged in terms sufficiently general to admit of proof of any and all specific manifestations of the defendant's disregard of his duty. The complaint in the second action states but a single cause of action—such is manifest from the mere reading of the complaint, and the plaintiff does not contend otherwise—and yet thereunder would be provable every allegation of the complaint in the former action and the cause of action alleged in the second complaint would thereby be sustained. This alone, we think, demonstrates that the cause of action alleged in the two complaints is identical, and, further, satisfies the test laid down in West v. Hennessey, 58 Minn. 133, 59 N. W. 984, and relied upon by the plaintiff; the observations there made on page 137 being confined to cases involving different causes of action.

[1] As stated by Chief Justice Gilfillan, in Thompson v. Myrick, 24 Minn. 4, 12: "If, then, the cause of action upon which this action is brought, is the same as that upon which the first action was brought—if this action presents no new cause of action, but only new grounds for relief upon the same cause of action—the judgment is a bar." This proposition is unquestionably sound both in reason and upon authority, and when stated without its condition it represents the conclusion which we have reached in the instant case.

Order reversed.

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EDWARD F. BERKNER and Another v. DUDLEY G. D'EVELYN.

EDWARD F. BERKNER and Another v. WILLIAM SCHMITT.

EDWARD F. BERKNER and Another v. MARTIN SHERMAN.[1]

October 25, 1912.

Nos. 17,862—(68).

Record of chattel mortgage — defective execution — notice.

A chattel mortgage running to a copartnership was witnessed by one of the copartners, but the fact that the witness was a copartner did not appear upon the face of the mortgage. As so executed it was filed in the proper office. *Held*, following Bank of Benson v. Hove, 45 Minn. 40, that, since the defect in the execution of the instrument did not appear upon its face, the record thereof was constructive notice to persons dealing with the mortgaged property.

Sale of mortgaged chattels — waiver of lien.

The sale of mortgaged personal property at public auction under an arrangement between the mortgagor and mortgagee, though not as a foreclosure of the mortgage in accordance with the statutes, but in good faith for the purpose of raising funds to discharge the mortgage debt, and without purpose to defraud subsequent mortgagees, does not constitute a waiver of the rights of the mortgagee as against a second mortgagee of the same property.

Action by junior mortgagee — defense of senior mortgagee.

The first mortgagee, or purchasers of the property at such sale, may interpose the first mortgage in defense to an action by the second mortgagee, in which a wrongful sale of the property is charged.

Three actions in the district court for Brown county, one to re-

[1] Reported in 137 N. W. 1097.

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cover possession of a sorrel mare or $200, her value, one to recover possession of a gray mare or $175, her value, and one to recover possession of a bay mare or $175, her value, in case of nondelivery, and $50 in each action for the detention. The answer in each case alleged that at the commencement of the action plaintiffs took possession under the writ of replevin and ever since retained possession of the animal; that her value during such time was $75, and demanded her value and $75 in addition for her detention. The reply in each case was a general denial. The cases were tried together by consent of the parties before Pfau, J., who made findings in each case, and as conclusion of law ordered judgment in favor of each defendant for the return of the property or, in case return could not be made, for the value of the mare. In the D'Evelyn and Schmitt cases the court also ordered judgment for $25 in favor of defendant for the detention. From orders denying their motions for new trials, plaintiffs appealed. Reversed.

Somerville & Hauser and *Brown, Abbott & Somsen,* for appellants.

Edward C. Farmer, Aug. G. Erickson, L. G. Davis and *C. T. Howard,* for respondents.

BROWN, J.

Three separate actions were brought in the court below to recover the possession of certain personal property. They were consolidated and tried together before the court without a jury. Judgment was ordered for defendant in each action and plaintiff appealed from an order denying a new trial.

The facts briefly stated are as follows: One Curtright was the owner of certain personal property, including that involved in these actions, and executed to one Cunningham a chattel mortgage thereon to secure the payment of about $2,000. The mortgage was duly executed and filed in the proper town clerk's office. Thereafter Curtright executed to plaintiffs another or second mortgage upon a part of the property so mortgaged to Cunningham, being that here in controversy, to secure the sum of $398. This mortgage was expressly made subject to the Cunningham mortgage. The mortgage

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was filed with the town clerk. Thereafter, and at a time when both mortgages were due and unpaid, the mortgagor, Curtright, at the instance and co-operation of Cunningham, the mortgagee, made a sale of all the property at public auction, and received therefor at such sale about $1,600, applying the same upon the Cunningham debt. Though notice of the sale was given by posting notices thereof in various public places, the sale was not had in foreclosure of the Cunningham mortgage, and no claim is made that the proceedings were conducted for that purpose. Each of the defendants herein separately became a purchaser of the part of the mortgaged property at that sale. On the claim that the sale, not having been conducted as a foreclosure of the Cunningham mortgage, was without authority, in violation of plaintiffs' rights as second mortgagees, and in effect a conversion of the property, plaintiffs brought this action to recover the property or its value. The trial court made findings covering various phases of the case, but the one point which resolved the case against plaintiffs was the finding that their mortgage was not executed in the manner required by statute to entitle it to record, and that the filing thereof was not constructive notice to defendants. Whether the court was right in that conclusion presents the principal question on this appeal. We come directly to that question.

Plaintiffs' mortgage was in the usual form of such instruments and designated the copartnership name, "Berkner Bros." as mortgagees. One of the witnesses to the execution of the mortgage was Edward F. Berkner, who was a member of the firm, but that fact did not appear upon the face of the mortgage. The trial court held that a member of the firm was disqualified as a witness, and for this reason that the mortgage was not executed in conformity with the statutes and, though filed, was not constructive notice to third persons, and not binding upon defendants.

Section 3461, R. L. 1905, provides that every mortgage of personal property shall be void unless given in good faith, and accompanied by an immediate change of possession of the things mortgaged, or filed in the proper office. Section 3462 provides that every such mortgage, "when executed in the presence of two at-

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testing witnesses and duly acknowledged," may be filed with the clerk or recorder of the town or municipality in which the mortgagor resides.

The contention in this case is that since the plaintiffs' mortgage was not attested by two competent witnesses it was not executed in conformity with the statute and, therefore, not entitled to record and, though filed in the proper office, was not constructive notice to third persons.

If the defect in the execution of the mortgage appeared upon the face of the instrument, the soundness of defendant's position could not be questioned. Tweto v. Horton, 90 Minn. 451, 97 N. W. 128. The authorities are practically uniform in so holding. But there is a diversity of opinion in cases, like that at bar, where the defect, whether in the acknowledgment or in the lack of proper attesting witnesses, does not appear upon the face of the instrument. A large number of respectable courts hold that when the instrument is fair upon its face, though there be a latent defect, the record thereof constitutes constructive notice under the recording acts. Read v. Toledo, 68 Oh. St. 280, 67 N. E. 729; Fisher v. Porter, 11 S. Dak. 311, 77 N. W. 112; Ogden v. Mensch, 196 Ill. 554, 63 N. E. 1049; Morrow v. Cole, 58 N. J. Eq. 203, 42 Atl. 673; Blanton v. Bostic, 126 N. C. 418. Other courts take the opposite view and hold that the defect, though not apparent upon the face of the instrument, may be shown by extrinsic evidence and the effect of the record overcome. Donovan v. St. Anthony, 8 N. Dak. 585, and authorities there cited.

We think the question was definitely settled in this state in favor of the rule first above stated in Bank of Benson v. Hove, 45 Minn. 40, 47 N. W. 449. In that case the chattel mortgage was acknowledged before a notary public who was an officer and stockholder of the mortgagee, a corporation. The court there held that the law forbids that the acknowledgment of such instruments should be taken before a party to the same, or by one who takes some interest under it, whether as a grantee, mortgagee, partner or trustee, but that since the disqualification of the notary did not appear upon the face of the instrument the mortgage was entitled to record and constituted

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constructive notice to third persons. The rule there laid down has since been acted upon as expressing the law of this state, and has been followed and applied in later cases and by other courts. 3 Notes to Minn. Cas. 440. There can be no difference of a substantial nature between a mortgage thus improperly acknowledged and one witnessed by an interested party, where the fact of interest and consequent disqualification does not appear on the face of the mortgage. If there be any difference from a legal standpoint it would seem that the improper witnessing was of less significance than the unauthorized acknowledgment. But from a logical standpoint there is no difference between the two situations. We follow and apply therefore the rule laid down in the Bank of Benson case, and hold that defendant's mortgage was constructive notice to all persons dealing with the mortgaged property. The defective execution of the mortgage appeared upon the face of the instrument in Tweto v. Horton, supra.

The trial court having proceeded upon the conclusion, as we understand the record, that plaintiffs' mortgage was invalid as notice, the further findings upon other questions in the case were unnecessary. Without standing as second mortgagees, plaintiffs' action failed and they were not entitled to recover. What the further findings would have been, and what disposition the court would have made of the case, had the court held the mortgage valid can, on the record before us, only be a matter of speculation on our part. We deem it therefore inadvisable to attempt to determine the other questions presented and discussed in the briefs. The case should go back for a new trial upon the correct theory of plaintiffs' position as second mortgagees.

We may say, however, in taking leave of the case, that the Cunningham mortgage was not waived by the arrangement for the sale of the property in the manner heretofore stated. If the sale was made in good faith and without purpose to defraud second mortgagees, the mortgage still remained a subsisting first lien, and since defendants purchased a part of the property at the sale they became subrogated, pro tanto, to the rights of Cunningham thereunder. The proceeds of the sale were paid to Cunningham, and were insufficient to discharge the debt in full. National Citizens' Bank v. Ertz, 83

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Minn. 12, 85 N. W. 821; Faeth v. Leary, 23 Neb. 267, 36 N. W. 513; Dempster v. Wright (Neb.) 95 N. W. 806. Plaintiffs were second mortgagees and they probably had the right to insist that the first mortgage be foreclosed in the manner provided by statute. But the irregular sale did not destroy the rights of the first mortgagee. The remedy of a second mortgagee in such a case is an action in replevin or trover, with the right to recover the property subject to, or the value thereof over and above, the obligation secured by the first mortgage. But since the trial proceeded below upon an erroneous theory of the law, as to plaintiffs' mortgage, we pass without further consideration the several questions discussed in the briefs, and remand the cause for a new trial.

Order reversed.

JOSEPH W. REYNOLDS v. GREAT NORTHERN RAILWAY COMPANY.[1]

November 1, 1912.

Nos. 17,605—(44).

Quære.

Quære. As between a landowner and a tort feasor, and in the absence of any act of severance on the part of the owner, is timber which has been felled by the act of God to be considered realty or personalty?

Measure of damages.

The true measure of the damages for the injury to and destruction of standing forest trees by fire, is the diminution in the value of the land caused by such injury.

Fire — charge to jury.

Instructions in an action based upon injury to and destruction of standing forest trees and fallen timber, by fire set by the defendant's negligence, considered and *held* to give the plaintiff full benefit of his contention that he was entitled to recover for the destruction of the fallen timber in its

[1] Reported in 138 N. W. 30.

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condition as it then lay on the ground, as well as for the injury to the standing trees.

Evidence of value.

In an action based upon the destruction of standing forest timber by fire, evidence of the value of the timber itself is admissible, not as defining the measure of damages, which is the diminution of the value of the land, but as being proper to be considered by the jury in applying the true measure and ascertaining the amount of the damages suffered.

Verdict.

Damages for the destruction by fire of standing and fallen timber, *held* not so manifestly insufficient as to require interference with the verdict awarding the same.

Action in the district court for Itasca county to recover $10,000 for the destruction of timber, lumber, cord wood, mining timber, poles and posts. The answer alleged that if plaintiff suffered any damage by reason of any fire, the same was caused or contributed to by his negligence. The case was tried before Stanton, J., and a jury which returned a verdict in favor of plaintiff for $800. From an order denying plaintiff's motion for a new trial, he appealed. Affirmed.

S. F. White, for appellant.

Baldwin & Baldwin, for respondent.

Philip E. Brown, J.

Action to recover damages for the destruction by fire, set by the defendant, of standing and fallen timber on thirteen forties of the plaintiff's two thousand acre farm in Itasca county. The cause was tried to a jury, who returned a verdict in favor of the plaintiff, and this is an appeal by him from an order denying his application to set aside the verdict and for a new trial.

It is undisputed that the plaintiff owned the land referred to and had on the forties mentioned a considerable quantity of standing and uncut fallen forest timber, consisting of birch, maple, cedar, basswood, tamarack, etc., trees, which were injured and destroyed by fire negligently set by the defendant, all of which timber, both

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standing and down, was then valuable and marketable, if it had been cut, for various uses, and had an established market value.

The questions involved on this appeal relate wholly to damages. "The one dominating question," says the plaintiff in his brief, "arises upon the rule of damages adopted by the court." Before considering this question, however, we deem it necessary to advert to the proceedings had upon the trial, and to some questions raised thereby, prior to the instructions.

The court permitted the plaintiff to introduce evidence, without limitation, tending to show the kinds, quality, amount, and value, both of his standing and down timber, separately and together, and also the extent of the injury to all of his timber which the plaintiff claimed was destroyed, and also the further fact that, if such timber had been cut when the fire occurred, it would have had a market at an established, stated, cash price. The plaintiff contends, furthermore, that the trial was conducted on his part upon the theory that his timber, whether standing or lying, was all convertible into commodities, for which there was an established market value; that his damages consisted of such market value, less the cost of marketing; and all the evidence on his part was introduced upon such theory and no evidence was offered as to the injury to the land, and that in no instance did any witness testify as to the value of the land before and after the fire. The record is somewhat obscure, but as we read it the plaintiff's counsel is mistaken concerning the facts last stated. At folio 34 of the paper book, we find the following testimony introduced, as we understand it, by the plaintiff. Q. "Mr. Anderson, are you acquainted with the value of lands in the neighborhood where you reside, independent of timber, lands that have no timber on, for instance? A. Yes, sir. Q. Are you acquainted with the value of timber also? A. Yes, sir. Q. Now, what would be the value of these lands, on the average,—I think there are fourteen forties,—considered entirely independent of any timber at the time this fire occurred? A. Six or seven dollars an acre. Q. And with the timber, Mr. Anderson, would those lands be worth six or seven dollars an acre, plus the net profit which you have mentioned for the various products? A. Yes, sir. You mean, yes."

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But assuming that the record is as claimed by the plaintiff in this regard, we will say, in passing, that if it should subsequently develop in the course of our consideration that the court, in its instructions, gave the correct rule of damages, the only possible objection thereto in this connection would be that the instruction did not conform to the evidence, and this would not be available to the plaintiff, for it would simply amount to a failure on his part to prove an essential element of his cause of action, namely, his damages, which, of course, would be no ground for granting him a new trial.

The plaintiff, in logically following his stated theory, made no particular distinction in his proofs between the separate values of the standing and the down timber, the proofs concerning the value of each shading into that of the other, and the plaintiff's effort evidently being to prove the gross amount of his damages occasioned by the destruction of both the standing and the down timber, irrespective of the precise and separate value of either.

On the other hand, the defendant claimed, to state it in the language of his counsel used on the trial, that "the measure of damage is the difference between the value of that land as it stood before the fire and the value of that land as it stood after the fire, and in whatever way that be arrived at by evidence, is the true basis of damages." The defendant further insists, in support of his contentions, that timber severed from the land by an act of God remains realty as between grantor and grantee and passes by a conveyance of the land, which proposition seems to be sustained by the authorities. See Ewell, Fixtures, 457; Duff v. Bindley, 16 Fed. 178. The rule is well stated in Leidy v. Proctor, 97 Pa. St. 486, 492, quoting from Rogers v. Gilinger, 6 Casey, 185, as follows: "What then is the criterion by which we are to determine whether that which was once part of the realty has become personalty on being detached? Not capability of restoration to the former connection with the freehold, as is contended, for the tree prostrated by the tempest is incapable of reannexation to the soil, and yet it remains realty. The true rule would rather seem to be, that which was real shall continue real until the owner of the freehold shall by his election give it a different character."

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The defendant contends that this same rule should control in assessing the damages for the down timber destroyed in the present action. In our view of the case, we do not deem it necessary to determine whether this rule would be applicable as between the owner of fallen timber and one through whose negligence it has been destroyed, that is, as between the owner and a tort feasor, for the determination of such question is not necessary to the decision of this case.

This brings us to the main questions involved. The plaintiff requested instructions in accordance with his theory of the case as above stated, namely, that the measure of his damages was the difference between the value of the timber as it was at the time of the fire and its value thereafter. The court properly refused this request, and upon the question of damages instructed the jury, in part, as follows:

"The difference in the value of the premises before the fire, including the timber thereon, and its value after the fire in the condition that it then was, would be the damages, if any, sustained by the plaintiff in this case. In other words, (and I want to be sure that I make myself plain in this regard), in determining plaintiff's damages, if any, you will compare the actual value of plaintiff's land with the trees and timber thereon just before the fire and before the trees were burned, with the actual value of the same premises after the fire and after the trees were burned. The difference in value will be the amount that plaintiff is entitled to recover in this action, if anything. Considerable evidence has been introduced during the trial of this case with reference to the condition of the tracts of land involved, the condition of the timber and the value of the particular kinds of timber on these tracts. This evidence was admitted as tending to aid you in reaching a conclusion upon the question as I have stated it to you, upon the question of the condition and value of the tracts before the fire and the condition and value of the tracts after the fire, and you will take into consideration all of the evidence in the case in reaching a conclusion in this regard."

This instruction states, we think, the true measure of damages which obtains where standing forest trees are destroyed or injured

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by fire. Carner v. Chicago, St. P. M. & O. Ry. Co. 43 Minn. 375, 45 N. W. 713; Hayes v. Chicago, M. & St. P. Ry. Co. 45 Minn. 17, 47 N. W. 260; Hoye v. Chicago, M. & St. P. Ry. Co. 46 Minn. 269, 48 N. W. 1117, approved in Ward v. Chicago, M. & St. P. Ry. Co. 61 Minn. 449, 63 N. W. 1104; Hueston v. Mississippi & R. R. Boom Co. 76 Minn. 251, 79 N. W. 92, applying the doctrine in an action for the overflowing of lands; 3 Joyce, Damages, § 2134, and cases cited; 3 Sedgwick, Damages, § 933, and cases cited; Miller v. Neale, 137 Wis. 426, 119 N. W. 94; Mahaffey v. New York, 229 Pa. St. 285; the two cases last cited being very recent ones and likewise well considered. Furthermore, this instruction, we think, gives the plaintiff in full measure the benefit of his contention that he was entitled to recover for the destruction of the down timber in its then condition as it lay on the ground, as well as for the standing trees. 3 Joyce, Damages, § 2134.

It is true that the court subsequently in its charge stated the rule of damages in a more restricted form than as above quoted, and in language which, if taken literally and alone, that is, not in connection with the portion which we have quoted, might, perhaps, be considered as ignoring the fact that the evidence established that there was fallen timber on the land, of value at the time of the fire. If, however, such should be deemed to be its effect, it was the plaintiff's duty promptly to call the court's attention thereto, and to request a clarifying addition; and in the absence of such a request, there was no reversible error in this regard. 3 Dunnell, Minn. Dig. § 9798.

There was no error in the action of the trial court in admitting evidence as to the damage to and the value of the timber itself, as above indicated, and such action was not inconsistent with the rule of damages given in the instructions.

"In its last analysis," said Mr. Justice Mitchell (p. 255) in Hueston v. Mississippi & R. R. Boom Co. supra, "the measure of plaintiff's damages was the difference between the value of the premises immediately before and immediately after the infliction of the injury. Upon the trial, evidence was introduced of this ultimate fact, and also as to the nature and amount of the particular items of damage; as, for example, the nature and extent of the injury to the

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mill machinery by the mud and water, the value of the use of the mill during the time it was shut down, the injury to the wall of the tail-race, and what it would cost to repair or restore the same, the extent and duration of the injury to the pasture land, and what the pasture in its former condition was reasonably worth. It is urged that this was admitting evidence under two different and separate methods or rules for the assessment of damages; that the plaintiff should have been compelled to adopt one or the other. On the contrary, we think the evidence was all admissible as tending to prove the same thing, viz., the damages to the premises by reason of the trespass. It is the most common thing in the world, in the trial of actions of this and analogous classes, to ask a witness how much less, in his opinion, the premises were worth after the injury than they were before, and then to particularize by introducing evidence as to the nature and extent of the different items which go to make up this estimated total diminution of value; and we never before heard this method of proving damages objected to."

To the same effect, see Miller v. Neale, 137 Wis. 426, 119 N. W. 94, which was an action for injury to standing timber by fire. "Nor was it error to admit proof of the damage to the timber itself," said the court. "While such proof does not determine the measure of the damages, it was entirely legitimate proof and entitled to be considered by the jury in fixing the diminished value of the land."

That the trial court in the instant case admitted the evidence of the value of the timber itself, upon the theory and for the purpose upon and for which such evidence was held admissible in the two cases last above referred to, is manifest from the latter part of the above quoted instruction.

The plaintiff finally insists that the damages allowed were so manifestly insufficient that it is apparent that they were awarded under the influence of passion or prejudice, and that the trial court erred in not granting him a new trial on this ground. We cannot so hold. The trial court's opportunity to correctly pass upon this contention equals ours at least, and we cannot disturb his determination.

Order affirmed.

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C. A. LANE v. NORTHERN PACIFIC RAILWAY COMPANY and Another.[1]

November 1, 1912.

Nos. 17,625—(21).

Question for jury—verdict not excessive.

Plaintiff's intestate was killed on a dark night at a dangerous highway crossing by the defendant's railway train. Verdict for $3,750 for the plaintiff. Evidence considered, and *held* that the question of the intestate's contributory negligence was one of fact to be decided by the jury, and that the damages are not so excessive as to justify any interference with the verdict.

Action in the district court for Ramsey county against defendant company and Walter Smith by the special administrator of the estate of Daniel H. Smiley, deceased, to recover $7,500 for the death of his intestate. The replies denied that the collision was caused by the negligence of the intestate. The case was tried before Brill, J., and a jury which returned a verdict in favor of the special administrator for $3,750. From an order denying their motions for judgment notwithstanding the verdict or for a new trial, defendants appealed. Affirmed.

C. W. Bunn and *George Hoke,* for appellants.

Thomas C. Daggett, for respondent.

START, C. J.

On June 7, 1911, about midnight, the plaintiff's intestate, while driving an automobile along a public highway over which the defendant's railway tracks crossed, was struck and killed by one of its passenger trains. This action was brought in the district court of the county of Ramsey to recover damages sustained by his next of kin by his death, on the ground that it was caused by the negligence of the defendant in driving its train on and over the highway crossing at an excessive rate of speed without giving any signal or warning

[1] Reported in 137 N. W. 1114.

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of its approach. The answer denied the alleged negligence of the defendant, and alleged that the death of the intestate was caused by his own negligence. The plaintiff had a verdict for $3,750, and the defendant appealed from an order denying its alternative motion for judgment or for a new trial.

The evidence was concededly sufficient to take the case to the jury on the question of the defendant's negligence, and the record presents only two questions for our consideration.

1. The first is this: Does the evidence conclusively establish that the intestate was guilty of contributory negligence? There was evidence tending to establish the evidentiary facts following:

The locus in quo was, under favorable conditions, an exceptionally dangerous highway and railway crossing for the reason, among others, that near it, and about one hundred feet west of it, was a junction of two of defendant's railway lines or tracks, one from St. Paul and the other from Minneapolis, to White Bear. The highway leading from St. Paul to White Bear approaches the railway crossing between the defendant's lines or tracks, and a point approximately within one hundred feet therefrom makes a turn and crosses the railway track at about right angles. It is difficult, by reason of trees and underbrush, for one traveling in the highway from St. Paul to see an approaching train until it is within a few feet of the highway crossing.

At the time of the accident, a freight train pulled in on the Minneapolis track, signalled for the crossing and came to a stop as the passenger train was nearing the highway crossing, at a dangerous rate of speed, without ringing the bell or blowing the whistle. It was a dark and cloudy night. The intestate was by occupation a driver of automobiles for hire. His eyesight and hearing were normal. He drove the automobile with passengers therein on the evening of the accident along the highway and over the railway crossing to White Bear and then returned to St. Paul. When the collision occurred he was going to White Bear for his passengers.

Other than this there was no evidence that would justify a find-

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ing that he was familiar with the locus in quo. No one saw the intestate or the automobile before the collision except the fireman of the passenger train, who testified that he first saw the automobile about six hundred feet from the crossing; that it appeared to be going nearly but not quite as fast as the train, thirty to thirty-five miles an hour, and that apparently it did not slack up much, if at all. The accuracy of the observation and opinion of the fireman and the inferences to be drawn from his testimony were questions for the jury, and it must be considered in connection with the evidentiary facts we have indicated.

Upon a consideration of the whole evidence we are of the opinion, and so hold, that fair-minded men might well draw different conclusions therefrom as to the alleged contributory negligence of the intestate, and that the question was one of fact to be decided by the jury, and not by the trial judge, and, further, that it was properly submitted to the jury.

2. The defendant further claims that the damages awarded are excessive. The intestate left two children, a boy and a girl, six and eight years old, living with their mother, his divorced wife. There was evidence tending to show that he was fond of his children, visited them, recognized his duty to them, and contributed to their support to some extent. He was thirty-three years old at the time of his death, and was earning $75 per month. We regard the award of damages as liberal, but not so excessive as to justify any interference with it by this court.

Order affirmed.

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JOSEPHINE GEIB v. COUNTY OF MORRISON.[1]

November 1, 1912.

Nos. 17,627—(25).

County ditch — findings not contradictory.

A finding that the proceedings to establish a drain under Laws 1905, c. 230, were regular is not impugned by another finding that certain proof of the publishing or posting of a required notice is lacking or insufficient, for the statute does not require proof of the publication, mailing or posting of the notices therein specified to be filed or preserved in the records of the proceedings.

Same — suit to remove cloud — estoppel.

A person who, with knowledge of the proceedings to establish a public drain which benefits his lands, stands by while such drain is being constructed, knowing that the expense thereof must be assessed against the lands benefited, cannot, after the lapse of more than three years, invoke the equity powers of the court to remove the cloud cast upon his said lands by the assessment made in the proceedings on the ground that these were without jurisdiction.

Action in the district court for Morrison county to set aside and vacate as to plaintiff's lands a certain tabular statement, list or assessment for a certain ditch, and to discharge the lands from the apparent lien and cloud on the title. The substance of the answer will be found in the second paragraph of the opinion. The case was tried before Nye, J., who made findings of fact and as conclusion of law ordered judgment dismissing the action. From the judgment entered pursuant to the order, plaintiff appealed. Affirmed.

A. H. Vernon, for appellant.

D. M. Cameron, for respondent.

HOLT, J.

The action was brought to remove the apparent lien cast upon plaintiff's land by the spreading upon the records of the auditor's

[1] Reported in 138 N. W. 24.

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tabular statement of benefits assessed against the land in an alleged invalid ditch proceeding under Laws 1905, p. 303, c. 230. Findings were made and judgment entered pursuant thereto, denying plaintiff relief. She appeals from the judgment.

The return does not contain a settled case or bill of exceptions, so that the correctness of the judgment must be determined by reference to the pleadings and findings alone. It appears therefrom that in February, 1906, proceedings were instituted before the board of county commissioners of Morrison county to establish county ditch No. 17. In September following, the order was made establishing the ditch, and in December thereafter, pursuant to the order, the auditor made and recorded the tabular statement charging the land of plaintiff and other lands with the assessments for the construction of the ditch. Plaintiff has been at all times in question a nonresident. The answer alleged that the ditch was actually constructed under the proceedings; that plaintiff's lands were thereby benefited; that the then owner of the land described in the complaint knew that the ditch was being constructed and made no protest until long after the work had been performed, except by protesting to the payment of the ditch assessment after it had been levied. There was no reply; hence the allegations as to benefit to plaintiff's lands from the construction of the ditch, her knowledge of the work while being done, her failure to object till long after its completion, stand admitted.

The only basis for an attack on the ditch proceedings results from the irregularities found by the court, as appears from the first of these two paragraphs of the findings:

"III. That the proceedings so had and taken by said board of county commissioners were in certain respects irregular in this, that the printer's affidavit of publication of notice of hearing upon said petition does not show that the same was sworn to by the person purported to have made and signed the same; that the proof of posting of notice of hearing to consider the engineer's and viewers' reports is defective in that it fails to show that such notice was posted in Township 39, Range 28, in which township a part of said

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ditch was located; that the notice of the meeting of the county commissioners to act upon said engineer's and viewers' reports was in fact posted at the court house door not more than twenty days before the date of said meeting; that the notice of such meeting was in fact posted in Township 39, Range 29, in which township a part of said ditch was located, not more than eleven days before the day of such meeting; but in all other respects the proceedings had and taken by said board of county commissioners in reference to the establishment, laying out and construction of said ditch, were in accordance with law.

"IV. That the ditch heretofore referred to was in fact constructed under the proceedings instituted therefor; that the plaintiff's land was in fact benefited thereby; and that no objection to such proceedings was made by the plaintiff prior to the bringing of this action, nor was any action taken at any time, either by injunction, certiorari, or otherwise, to test the validity of said proceedings, or the taxes attempted to be collected thereunder prior to the bringing of this action."

The two irregularities first specified by the court cannot be material. The finding that all the proceedings were in accordance with law amounts to a finding that the notice of hearing was duly published and posted. Undoubtedly it is commendable practice to preserve proof of such publication by filing an affidavit of the printer as to the paper and issues thereof in which the notice was published, and also proof as to mailing and posting. Where the law so prescribes, it must be done. But it is to be observed that the statutes relating to these proceedings are silent on the matter. The county commissioners are required to satisfy themselves that the prerequisite notice has been given, and their order establishing the ditch is prima facie proof thereof. Laws 1905, p. 336, c. 230, § 48.[1] So also the finding that the proof of posting the notice of hearing to consider the engineer's and viewers' reports is defective, in that it fails to show that such notice was posted in Town 29, Range 28, in which township a part of the ditch is located.

[1] [R. L. Supp. 1909, § 2651-91.]

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is not material, for it is not a finding to the effect that such notice was not in fact posted.

The court, however, does find that the notice on the engineer's and viewers' reports was not posted for the requisite number of days before the hearing at the court house, and in the township where is plaintiff's land and part of the ditch. Whether the failure so to do ousted the commissioners' jurisdiction, if they had acquired it by the due notice of the hearing on a proper petition for the ditch, or whether they could not obtain any jurisdiction because the notice was not posted in the places mentioned in the findings the length of time required, or whether plaintiff, being a nonresident, the service of the notice by mail, as required by the statute, was sufficient to give jurisdiction as to her interest in the land, we need not stop to consider in this case, for we are of opinion that the record shows that plaintiff is not in position to invoke the aid of the court. Her knowledge of the construction of the ditch is established by failure to reply to the answer alleging such knowledge. The ditch benefited her lands. She permitted the county and persons interested to incur the expense of the enterprise, knowing that the same would be assessed against lands benefited. No objection was made by her in the ditch proceeding and no appeal taken from the order therein. She waited almost four years after the work was done before bringing the present action. Her conduct has been such that her suit at this time ought not to move the court of equity to her aid.

In State v. Johnson, 111 Minn. 255, 126 N. W. 1074, the court intimates that where a property owner stands by and witnesses the expenditure of public funds in improvements which confer special benefits upon his property, and where the character of the improvement is such that it must be paid for by an assessment upon the land benefited, he ought not to be permitted to question the validity of an assessment for improvements made under color of law.

This rule is firmly established in Indiana, as appears from Board v. Plotner, 149 Ind. 116, and the cases therein cited. In Atwell v. Barnes, 109 Mich. 10, a case to enjoin the collection of a drainage tax, the contention was made that the defects in the drain proceeding were jurisdictional. The court says: "Where this is the case,

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no waiver can cut off the rights of the party, or interfere with his right to complain. We need not determine what would be the right of complainant at law. The cases above cited [Bryan v. City of Detroit, 50 Mich. 56; Lundbom v. City of Manistee, 93 Mich. 170; Goodwillie v. City of Detroit, 103 Mich. 283] do not turn on the principle of waiver, but hold that, where a party stands by and sees work of this kind go on, with full knowledge that he is to be assessed therefor, and knowing that those who do the work can be compensated in no other way than by an assessment for benefits, and when, as in the present case, the complaining party actually receives a benefit from such work, equity will not interpose to relieve him." Kellogg v. Ely, 15 Oh. St. 64.

We therefore hold that plaintiff, having stood by while a ditch was constructed which benefited her land, with full knowledge of the proceedings and that the expense thereof would necessarily be assessed against lands benefited, she cannot now after a lapse of more than three years after completion of the enterprise, invoke equitable relief.

The judgment is affirmed.

PAUL KANNE v. FREDERICK F. KANNE and Others.[1]

November 1, 1912.

Nos. 17,652—(22).

Motion for judgment on pleadings.

Plaintiff's motion for judgment on the pleadings *held* properly denied, even though he were entitled to partial relief, where the motion does not so limit the recovery sought.

Admissions against interest where witness is spouse of party.

Admissions against interest are admissible against the one making them, although the spouse of such person is a party to the action, and do not come within the inhibition of R. L. 1905, § 4660, which prohibits one spouse

[1] Reported in 138 N. W. 25.

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from testifying in a case where the other spouse is a party, without the latter's consent.

Dismissal of action without making findings.

The evidence and issues examined and *held* that it was error to dismiss the case on the merits when the parties rested, without making findings of fact and conclusions of law.

Dismissal of action — defect of parties.

A party who has neither demurred, because of defect of parties, nor set up such defect by answer, is not entitled to a dismissal of the action on the merits on the ground of defect of parties.

Partial relief.

Under the pleadings and the admitted facts, plaintiff was entitled to some relief, even if he failed to establish that the contract between the defendants was a fraudulent transfer as to the then existing creditors of one of the parties to the contract.

Vendor and purchaser — gift.

Under the contract involved here, the vendors agreed to convey the land in consideration of the vendees' agreement to pay $150 annually to the vendors and the survivor during life, and $5,000 to their legal heirs at the death of the survivor of the vendors, with a provision that the vendees had the right at any time prior thereto to pay the vendors $5,500 and obtain a deed and terminate the contract. *Held*, that there was no executed gift to the heirs of the vendors.

Action in the district court for the county of Waseca by the trustee in bankruptcy of Frederick F. Kanne against Frederick F. Kanne, Augusta M. Kanne, his wife, Tobias Broadbent and Martha A. Broadbent, to decree that the contract mentioned in the opinion be adjudged null and void, that the property specified in the contract be subject to sale to pay the debts of the bankrupt, and for other and further relief as to the court should seem meet. The substance of the allegations of the complaint and answer will be found in the fourth and fifth paragraphs of the opinion. The reply was a denial of the new matter set up in the answer. The case was tried before Childress, J., who denied plaintiff's motion for judgment on the pleadings, and granted defendants' motion to dismiss the action on the ground that plaintiff had failed to prove a cause of action against

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either of them. From an order denying plaintiff's motion for a new trial, he appealed. Reversed.

F. B. Andrews, Moonan & Moonan and *H. L. Schmitt,* for appellant.

Morgan & Meighen, for respondents.

HOLT, J.

For ten years prior to 1907, the defendant Frederick F. Kanne conducted a private bank in partnership with his son, Albert J., the latter having the active management thereof. For some years prior to March 21, 1905, Frederdick F. Kanne had been the owner of a farm near Waterville, Minnesota, worth between $5,000 and $6,000. On that date he and his wife entered into a contract to convey this farm to their daughter and son-in-law, the two other defendants herein, in consideration of certain covenants therein contained. No money consideration was paid. The covenants or agreements in the contract here material are to the effect that the vendees agree to pay to the vendors, beginning February 1, 1906, the sum of $150 annually during the lives of the vendors and the survivor of them. Immediately after the decease of the survivor, the vendees shall pay to the legal heirs of the vendors the sum of $5,000, to be distributed as provided by law. It is provided that should the vendees, during the life of the vendors, desire to obtain a deed of the farm for the purpose of selling it, then the vendors, upon payment to them of $5,500, agree to execute a good and sufficient warranty deed, thereafter the contract to be of no force or effect. The vendees were to have possession, pay all taxes, and were not to cut any green timber till $500 worth of permanent improvements had been placed on the farm by the vendees. Upon default by the vendees to perform, the vendors reserved the usual right to terminate the contract, which by its terms extended to and bound the heirs, administrators and assigns of the respective parties.

In November, 1905, the defendants Kanne made similar contracts with two other children to convey to each one hundred twenty acres of land in Otter Tail county, the annual payments and the payments to the legal heirs being however in different amounts. The record

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is silent as to the existence of other children, or children of deceased children, except Albert J. Kanne.

In 1907 Albert J. Kanne, who was also in the mercantile business with his wife as partner, went into bankruptcy. His individual creditors, the major portion of whom were depositors in the bank, have received forty-four per cent in dividends upon their claims.

In 1909 the defendant Frederick F. Kanne entered the United States bankruptcy court, and plaintiff was duly appointed trustee. No assets have come into the hands of the trustee and a large amount of claims were filed and allowed against the estate. A great many of these claims are for money deposited prior to March 21, 1905, in the bank conducted by defendant Kanne and son. The trustee brought this action, alleging the adjudication of Frederick F. Kanne a bankrupt, plaintiff's appointment and qualification as trustee, the relationship of defendants, Frederick F. Kanne's operation of the bank as above stated; that while so engaged with his son they became indebted to divers parties in a sum exceeding $17,000, and became and were insolvent during all the time, and while so insolvent the defendant Frederick F. Kanne, for the purpose of placing the said farm beyong the reach of his creditors, being then the owner thereof, executed with his wife the contract above mentioned to defendants Broadbent, setting it out in full. It further alleged that said contract was made and entered into by and between the defendants for the sole purpose of placing the farm, worth $10,000, beyond the reach of creditors, and with an attempt and for the purpose of reserving to the said defendants Kanne an annuity during their natural life, and that no consideration was paid for the contract. It also stated that the estate of said bankrupt Frederick F. Kanne is insufficient to pay the creditors that were such at the time the contract was made, and that it is necessary to sell the said farm to pay such creditors. Plaintiff asked that the contract be declared null, and the farm be decreed subject to sale to pay the debts of the bankrupt, and for such further relief as to the court shall seem proper.

The answer admitted the adjudication of defendant Kanne a bankrupt, and the relationship of defendants, the partnership of the father and son in the banking business mentioned for more than ten

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years prior to the bankruptcy proceedings, also the contract set out in the complaint. It alleged that the contract in question was made for a valuable consideration in good faith, and without intent to defraud creditors. The insolvency of Frederick F. Kanne at the time the contract was made is denied.

A trial was had to the court, at the conclusion of which the parties having rested, the court dismissed the action without making any findings. Plaintiff's motion for a new trial was denied, and he appeals. The assignments of error relate to the refusal of the court to grant plaintiff's motion for judgment on the pleadings; to the exclusion of certain evidence; to the order dismissing the action after the parties rested without filing findings of fact and conclusions of law; and to the refusal of the court to grant relief upon the evidence adduced.

It is clear that the court was right in denying the motion for judgment on the pleadings, for plaintiff did not, in that motion, limit his right to relief to the interest Frederick F. Kanne derived through the contract. That being so, the insolvency of Kanne at the time of making the contract and the then existence of the creditors now represented by plaintiff stood denied, as well as the averment that such contract was a fraudulent conveyance. Even if the contract be a voluntary conveyance on its face, its fraudulent character is not thereby established so as to give plaintiff the right to have it set aside.

The court also rightly rejected the testimony taken against the objection of Mrs. Kanne when her husband was called by plaintiff for cross-examination, because R. L. 1905, § 4660, does not permit a spouse to testify, in a cause where the other spouse is a party, without the latter's consent. But we think the trial court misconstrued the scope of the decisions in Halbert v. Pranke, 91 Minn. 204, 97 N. W. 976, and National German-American Bank v. Lawrence, 77 Minn. 282, 79 N. W. 1016, 80 N. W. 363, in making the ruling evidenced by the memorandum order stating "the petition and schedule in bankruptcy of both the Kannes and all evidence relating to insolvency proceedings have been disregarded by the court as they were inadmissible," citing Halbert v. Pranke, supra. If a spouse

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has, to third parties, made an admission against the interest claimed by such spouse in the suit, such an admission, oral or in writing, is clearly admissible as to such spouse, although the other spouse is a party to the action. Of course, as to the latter's position or rights, such admissions have no force or effect. The statute prohibiting one spouse from testifying without the consent of the other was not intended to exclude voluntary statements made to the world from being used against the spouse making them, no matter who the other parties litigant may be. The schedules were not offered, but under the ruling the court erroneously excluded everything in the bankruptcy proceedings, even the duly proved adjudication of claims.

In this case one of the ultimate facts, viz: whether the contract was a fraudulent conveyance, involves inferences and conclusions to be drawn from the existence of other facts in issue, therefore findings should have been made. Merritt v. Joyce, 117 Minn. 235, 135 N. W. 820. This is not a case where the failure to establish a simple issue of fact determines the law suit, and where it may be said that the court, in a trial without a jury, in dismissing the case, determined that the evidence adduced did not establish such fact.

But we are also of the opinion that plaintiff was entitled to substantial relief, even if the contract be not void. Frederick F. Kanne, under the contract, had the legal title to the land and also rights therein to which plaintiff is entitled, which this suit should properly define and determine. It is virtually conceded that the right to the annual payments has vested in the plaintiff herein. But defendants contend that no suit is needed to reach these, also that no other relief may be granted herein than canceling the contract, if it be found a fraudulent transfer, and further that the legal heirs of the Kannes are necessary parties. We may concede that, if the plaintiff herein is not entitled to reach more than the annual payments, his right thereto is so clear that no action is necessary to define it, in order to realize the proper amount for the bankrupt estate. But measuring plaintiff's rights as an assign under the contract, we think he is entitled to more, as will be presently stated. The objection that under the pleadings no relief may be granted, unless the contract is void as to creditors, is not tenable. The contract in ques-

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tion is set out in the complaint, and the prayer is for its cancelation and such further relief as to the court may seem meet and proper. Whatever interest plaintiff has in the land or the contract may properly be determined under the pleadings, notwithstanding some allegations in the complaint become superfluous if the contract be held not void.

If the legal heirs were necessary parties, the court could have directed them to be made parties, or perhaps had the authority to dismiss on that ground, Harper v. Carroll, 66 Minn. 487, 69 N. W. 610, 1069, but should not have dismissed on the merits without an opportunity to plaintiff to bring them in. The defendants could not take advantage of defect of parties except by answer or demurrer, neither of which was done. Budds v. Frey, 104 Minn. 481, 117 N. W. 158, and cases there cited. Of course, if the legal heirs of the Kannes have no present interest in the land or the contract, it is evident that they are neither necessary nor proper parties. And that brings us to an important matter in the litigation.

It is evident that F. F. Kanne and wife attempted to dispose of their farms to some of the children under contracts, so that the children should not be required to pay the purchase price till after the death of both parents, such price to be shared equally by their heirs. Whether this was for the purpose of defrauding creditors, or for the legitimate end of securing an annual income for their needs without being troubled with the active management of the property, we need not consider. The question is this: Is the purchase price stipulated to be paid under the contract the property of Kanne or the heirs of the Kannes? Defendants earnestly contend that it is an executed gift to the heirs beyond the power of Kanne to revoke, or in other words, a gift inter vivos. It may be proper to remark here that, if that be so, it goes far to prove the transfer a voluntary conveyance, prima facie void as to creditors under the decision in McCord v. Knowlton, 79 Minn. 299, 82 N. W. 589. The plaintiff, on the other hand, maintains that it is an attempted testamentary gift and revocable, and of no effect. Hence the heirs have no interest whatever based on the contract. It is to be observed that great uncertainty is found as to who is meant by the legal heirs. Is it the heirs of the

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survivor, or of both, or of the one in whom stands the legal title? Does it mean the heirs at the time of the contract or the time of death? This very uncertainty militates against a holding that here was a gift inter vivos. Further, how can this be said to be an executed gift, for the day after the contract was made the vendees could have tendered the purchase price to the vendors, and who of the heirs of Kannes could have disputed their right to the whole of it? And we also fail to see why the vendors and vendees could not at any time, by mutual consent, have canceled the contract. If defendants' contention be true, the Broadbents could have at any time tendered $5,500, less the share which would go to Mrs. Broadbent as a legal heir of her parents, and demanded a deed, or they could have paid the full sum and at once compelled Kanne to repay her share or be holden for the amount as her trustee. Such a result does not appeal to us as reasonable. It seems to us that the legal effect of the contract must necessarily be that no present interest or right to the purchase price therein agreed to be paid by the vendee vested in "the legal heirs" of the vendors, and hence the legal title to the land and to the purchase price stipulated in the contract remained in Frederick F. Kanne, and, unless he shall otherwise dispose of the same, it will pass at his death to his legal heirs, subject to the rights of the vendees and the creditors of his estate. Defendants rely on Love v. Francis, 63 Mich. 181, but it will be noticed in that case that no contingency permitted payment of the gift to the donor, the note and mortgage were payable to the donor's heirs four years after his death, but the interest to him as long as he lived. The court in McFerrin v. Templeman, 102 Tex. 530, though cited to the Michigan decision, holds upon very similar facts, that the transaction did not amount to an executed gift inter vivos.

Our conclusion is that there should be a new trial, so that upon proper findings of fact the right conclusion of law may be reached. The order denying a new trial is reversed.

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BERT WIGGIN v. NORTHWEST PAPER COMPANY.[1]

November 1, 1912.

Nos. 17,662—(27).

Safe place to work — duty of master.

The plaintiff, an employee of the defendant, was directed by it to work upon a coal conveyor in its paper mill. The place in which he was required to work was a reasonably safe one, if the conveyor was not put in motion, but one of peril to him, if it was started without warning to him. *Held:* That it was the absolute duty of the defendant to use ordinary care to protect the plaintiff while so at work from injury by the starting of the conveyor without warning; that the evidence was sufficient to sustain a finding that the defendant did not exercise such care; that there was no reversible error in the charge of the court; and that the award of damages, as reduced, is not excessive.

Action in the district court for Carlton county to recover $1,999 for personal injuries. Among other matters, the complaint alleged that defendant failed to provide plaintiff with a reasonably safe place where he could stand and work, but required him to support himself in and about machinery which was at any time liable to be started and cause him injury; that plaintiff was ignorant that the machinery might be started, and he relied upon the fact that defendant would not endanger him by starting the machinery, but believed the place of work to be reasonably safe; that defendant negligently failed to give him any notice or warning of any danger, but caused the machinery to be started while plaintiff was so exposed to danger therefrom. The answer admitted that plaintiff was in defendant's employ as assistant millwright, engaged in making improvements and repairs in the factory; admitted plaintiff's injury while so employed, but denied knowledge as to the manner in which the injury was received, or as to its extent, and denied that plaintiff's earning capacity had been permanently impaired by reason of the injury; admitted

[1] Reported in 137 N. W. 1113.

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that it was its duty to exercise reasonable care in providing plaintiff a reasonably safe place in which to work, and alleged that it did exercise such care and provide him a reasonably safe place in which to work. The answer further alleged that plaintiff's injury was the result of his own negligence. The reply was a general denial of the new matter contained in the answer.

The case was tried before Dibell, J., who denied defendant's motion for a directed verdict, and a jury which returned a verdict in favor of plaintiff for $1,000. From an order denying defendant's motion for judgment notwithstanding the verdict and granting its motion for a new trial, unless plaintiff would consent that the verdict be reduced to $750, it appealed. Affirmed.

Alexander Marshall, for appellant.

John Jenswold, Jr., and *C. R. Magney,* for respondent.

START, C. J.

Appeal, in a personal injury action, from an order of the district court of the county of Carlton denying the defendant's motion for judgment notwithstanding the verdict or for a new trial. The plaintiff had a verdict for $1,000 and a new trial was denied on condition that he consented to a reduction thereof to $750.

The plaintiff, on February 16, 1910, was employed in the defendant's paper mill at Cloquet as a millwright's helper. He was directed by the millwright, who was his foreman and a vice-principal, to assist him in the alteration of a coal conveyor, which was used to convey coal to the boilers in the boiler room. The place assigned to him in which to work was a reasonably safe one, if the conveyor was not put in motion, but obviously dangerous if it was started without first warning him. While he was working on the conveyor, it was started without warning to him and he was caught between one of the cables of the conveyor and the wheel on which it was running, whereby he was injured. The plaintiff, when so injured, was working at a point some twelve feet or more above the floor of the boiler room, where the coal conveyor was operated by either the fireman or his assistant, and started, by one of them, whenever more coal was required, by pulling down on a cable which set the machinery in motion. The conveyor

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was stopped by pulling on a cable hanging within two feet of the cable which started the conveyor. The cables were similar in appearance and neither had any distinguishing mark or label.

The evidence as to the foregoing facts was substantially uncontradicted. There was also evidence, conflicting in some material particulars, tending to show that it was the duty of the fireman and his assistant to start and stop the conveyor, and, when about to start it, to see that no one would get hurt thereby; that they had full charge of the machinery by which it was started and stopped; that the millwright, when the work on the conveyor was commenced, called down to the fireman not to start it until the work was finished, but no response was made from below and neither of the firemen heard the order; that when the fireman got ready to start the conveyor he called "watch out," and without waiting for any answer, or giving any instructions to his assistant who remained in the boiler room, went out of the boiler room, threw in the friction clutch in the machine shop preparatory to starting the conveyor; the assistant fireman then started, as was his custom in such cases, to throw on the friction in the boiler room, which would start the machinery, then some one called out not to start it, but, by mistake or otherwise, he pulled the wrong cable and the conveyor was set in motion, which resulted in the plaintiff's injury.

The trial court instructed the jury that:

"If reasonable and ordinary care for the safety of the plaintiff, while he was doing the work he was put to do, required of the defendant that it see to it that the cable should not be started, its negligent failure to do so makes it liable, in the absence of contributory negligence or the assumption of risk by the plaintiff.

"If the plaintiff was set to work at a place which would be dangerous to him if the cable started, and ordinary care for his safety made it the duty of the defendant to see that the cable remained stationary while he was at work there, and it negligently failed to see to it, then it is liable to the plaintiff, unless he was, himself, negligent or assumed the risk which resulted in his injury."

No objection was made by the defendant to these instructions at

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the trial, but were first excepted to on the motion for judgment or a new trial.

The defendant's first contention to be considered is to the effect that the plaintiff's injury was caused by a mistake or negligence of his fellow servant, the assistant fireman, for the reason that the defendant "had provided a reasonably safe place, and the keeping of this conveyor stationary was merely incidental to the work of altering it, and the case at bar does not come within the customary warning rule, which is peculiar to this state and one or two others."

It is obvious that the place in which the plaintiff was required to work was one of peril, unless the conveyor remained stationary, and that the keeping of it stationary was not merely incidental to the work to be done upon it, but that it was the absolute duty of the defendant to exercise ordinary care, that is, due care, to protect the plaintiff, while so at work, from injury by the starting of the conveyor without warning. Aho v. Adriatic Mining Co. 117 Minn. 504, 136 N. W. 310. Whether the defendant exercised such care for the safety of the plaintiff, was made by the evidence a question of fact, for it does not conclusively appear from the evidence that the plaintiff was injured solely by the negligence of a fellow servant. The defendant's motion for judgment absolute in its favor was rightly denied.

In support of its motion for a new trial the defendant urges that the giving of the instructions we have quoted was reversible error for the reason that they "gave the jury the right to say that reasonable care required that defendant should guarantee that the conveyor should not be started by any cause or agency." If such be the fair import of the instructions, they constitute reversible error. We are, however, of the opinion that the construction of them claimed by the defendant is not justified by the language of the trial court. The jury were told in effect that, if reasonable care for the safety of the plaintiff required the defendant to see to it, that is, to take care, that the conveyor was not started while he was at work on it, and if the defendant negligently failed so to do, then it was liable to the plaintiff, unless he was himself negligent or assumed the risk. So construed, the instructions were correct, and if there was any reason to apprehend that the jury might not so understand them, the attention of

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the trial court should have been called to them at the time they were given, instead of excepting to them for the first time on the motion for a new trial.

The defendant's last contention is that the damages are excessive. The evidence tended to show that the plaintiff's injuries were severe, but not permanent, and that he suffered great pain, and special damages to the amount of some two hundred dollars. We are of the opinion that the award of damages as reduced is only fairly compensatory.

Order affirmed.

JOHN VILLS v. CITY OF CLOQUET.[1]

November 1, 1912.

Nos. 17,679—(30).

Negligence in storing explosives.

Defendant kept a quantity of explosive fuse caps in a tool house on a lot in the city. Boys went into the tool house through an opening in the loose stones used as a foundation, took the caps, and threw them on the ground outside of the house. Plaintiff's six-year-old son, in playing about the premises, found one of the caps, and was injured by its explosion while he was playing with it. It is *held:*

1. The evidence sustains a finding that the defendant was negligent in storing the fuse caps in the tool house without sufficient precautions to prevent children from entering and taking them.

2. It was a question for the jury whether such negligence was the proximate cause of the injury, and the evidence sustains the verdict on this point.

3. Allegations of the pleadings construed and held that the answer admitted that plaintiff had caused due service of a notice of the time, place and circumstances of the accident to be served upon the proper city officers.

Action by John Vills, as the father and natural guardian of John

[1] Reported in 138 N. W. 33.

Note.—As to liability for injury to children from explosives left accessible to them, see notes in 14 L.R.A.(N.S.) 586; 24 L.R.A.(N.S.) 1257.

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W. Vills, his infant son of six years, in the district court for the county of Carlton, to recover $25,000 for the benefit of the son. The complaint, among other allegations, averred that it was the duty of defendant city under the laws of the state and its charter, if, in the prosecution of its public work, it was required to use dynamite fuse caps, fuses or other explosives, carefully to handle them and, when the same were not being used, safely and carefully to house and store them in such manner that the same could not be gotten at, or secured, in any way by children or any other person who might endanger their lives and limbs by the thoughtless or ignorant use of such explosives, and such was its duty toward the public and especially to the minor son of plaintiff, and other children of like age; that it wholly and negligently failed to perform this duty. The complaint then set up the facts mentioned in the opinion, and alleged that the fuse caps were composed of brass or copper, making a bright metal, and were especially attractive to and [eagerly] sought by children for purposes of play, a fact which defendant in the exercise of reasonable care should have especially guarded against in the storage of caps in its store house, and such was its duty toward the public, and especially toward plaintiff's son and other children of similar age and inexperience, all of which reasonable care plaintiff failed to exercise in the premises. The answer admitted that John W. Vills was injured, alleged that defendant did not know the manner of said injury and therefore denied the same. It also contained the allegations quoted in the opinion on page 282. The reply was a general denial.

The case was tried before Dancer, J., who denied defendant's motion for a directed verdict, and a jury which returned a verdict in favor of plaintiff for $2,250. From an order denying defendant's motion for judgment notwithstanding the verdict and in part granting its motion for a new trial, upon the issue whether due notice of the injury was served upon the city, defendant appealed. Order denying judgment notwithstanding the verdict and denying a new trial affirmed. Order granting a new trial on the issue of notice to the city reversed, with directions to the trial court to enter judgment on the verdict.

J. A. Fesenbeck and *Baldwin & Baldwin,* for appellant.

John A. Keyes and *Bert W. Forbes,* for respondent.

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BUNN, J.

This action was brought by plaintiff, as the father and natural guardian of his six-year-old son, to recover for personal injuries received by the latter through the explosion of a fuse cap with which he was playing. The trial resulted in a verdict of $2,250 in favor of plaintiff. Defendant moved for judgment notwithstanding the verdict or for a new trial. The motion for judgment was denied, and the motion for a new trial granted solely upon the issue as to whether due notice of the time, place and circumstances of the injury was served upon the defendant city, as required by statute. Defendant appealed from the whole of this order, and plaintiff appealed from that part of the order which granted a new trial on the issue named.

The chief question, on defendant's appeal, is whether a case was made for the jury, and if so, whether the evidence sustains the verdict. The evidence justified a finding that the following facts were true:

In April, 1910, defendant, the city of Cloquet, set up a stone crusher and tool house near a stone quarry on a vacant lot near the city for the purpose of quarrying and crushing stone for street improvements. The crusher stood near the road, and was supplied with stone from the quarry by means of a miniature railway track and cars. The tool house stood about forty feet back from the road. A wire fence surrounded the lot, but part of the wires were down at a point near where the crusher was, and access to the lot and tool house through this opening was easy. The tool house was about fourteen feet square and nine feet high, and had a door and two windows. It rested on stones placed under the corners; loose stones were also placed under the sides and ends of the shed; there was no floor to the tool house and the stones were for the purpose of guarding against theft of the tools. The city of Cloquet completed its work about July 1, 1910, and abandoned the premises, leaving the tool house locked, and the windows fastened. In September, 1910, the Cloquet Lumber Company, by permission of the city and under its supervision, used the crusher and tool house. This work was completed in October. After this no use was made of the crusher or tool house,

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but they remained on the premises, with no supervision save one or two visits by employees of the city. In the spring of 1911, boys occasionally visited the premises, and played with whatever pleased their fancy. About a month prior to the accident some boys entered the tool house by going through a hole between the stones under it, and carried away lubricating oil found in a barrel. Two or three days before the accident two boys entered through the hole and took some fuse caps from a box that stood on a shelf under one of the windows. This box of caps, with wires protruding from them had been left in this position in the tool house by defendant. The boys brought out the caps they had taken, and threw them at a companion who had climbed a tree near the house. Two days after this, John Vills, son of plaintiff, with other boys, was playing around the house. He found one of the caps on the ground. It was bright and attractive, and he proceeded to hammer it with a stone, to "flatten it out," as he testified. The result was that the cap exploded and a piece struck him in the eye, causing the injuries for which damages were claimed in this action.

The evidence showed that it was customary for small boys to play about the crusher, tracks and shed. The Vills boy had been a visitor to the premises on one or two prior occasions. It did not appear that defendant took any steps, other than as stated, to keep boys from playing around the premises, or from entering the house through the hole between the stones, though the evidence was sufficient to make it probable that this way of entrance had existed for several months.

Was the evidence, an outline of which is given above, sufficient to sustain a verdict that defendant was negligent, and that its negligence was the proximate cause of the injury?

Upon the question of defendant's negligence, or rather as to the liability of defendant to an infant trespasser who is injured, defendant seeks to bring the case within the rule that the owner or occupant of land owes no duty of care to a trespasser, be he infant or adult, except the duty to refrain from wilfully or wantonly injuring him. But the case, in our opinion, falls within a well-established exception

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to this rule. The doctrine of the so-called "turntable cases" is applicable, as was held by this court in the dynamite case of Mattson v. Minnesota & North Wisconsin R. Co. 95 Minn. 477, 104 N. W. 443. The rule has been stated so many times and has been stated so clearly in the Mattson case that it is unnecessary to repeat it here.

Several reasons are urged to support defendant's argument that this doctrine does not apply to the facts in the case at bar. It is urged that the evidence does not justify a conclusion that defendant left the fuse caps in the shed, but we think it does.

It is argued that defendant used due care to conceal and guard the fuse caps when it locked the tool shed and fastened the windows. But in this we cannot concur, considering the high degree of care required of defendant respecting the care and custody of such a dangerous explosive, and the easy access to the box of caps through the hole under the shed.

It is sought to make a distinction between sticks of dynamite and these fuse caps. But undoubtedly the latter were highly explosive and very dangerous to children playing with them. They were clearly highly attractive, and it was natural to expect that young children whose curiosity or mischievous propensities led them into the shed would seize upon the caps as fine things to make a noise with, or as pretty playthings. It is true that the six-year-old plaintiff had no idea that the cap was explosive, and merely tried to flatten it out, but this does not seem an important feature. It was something new, bright and alluring, and something that was very dangerous in the hands of a six-year-old boy.

We think the evidence fully justified the jury in finding that defendant ought to have anticipated that children might enter the shed, get into the box of caps left exposed on a shelf, leave some of them around where they might be found by other children, and that injury might result. In other words, the finding that defendant was negligent is sustained by the evidence. While the facts are different, we think the case is not to be distinguished from the Mattson case.

The claim that defendant's negligence was not the proximate cause of the injury rests upon the proposition that there was an intervening, independent cause, to-wit: the act of the boys other than plaintiff in

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bringing the caps out of the tool house and scattering them on the ground. We think this question is disposed of adversely to defendant's contention by what we have already said as to the duty of defendant to anticipate an accident such as happened. The negligence of defendant in leaving the fuse caps where it did was not a remote cause; at least it was a question for the jury, and properly submitted to it. The cases have been so many times reviewed that we need do no more than state our conclusion, which we think is amply sustained by many decisions of this court. The principle is that where several concurring acts or conditions, one of them a wrongful act or omission, produce an injury, such wrongful act or omission is to be regarded as the proximate cause of the injury, if it be one which might reasonably have been anticipated from such act or omission, and which would not have occurred without it. McDowell v. Village of Preston, 104 Minn. 263, 116 N. W. 470; Anderson v. Settergren, 100 Minn. 294, 111 N. W. 279. The instruction on the question of probable cause, which is assigned as error, was correct.

We find no error in the other instructions complained of. Our conclusion is that the order denying judgment notwithstanding the verdict, and denying a new trial, must be affirmed.

This brings us to the appeal of plaintiff from that part of the order granting a new trial on the issue of whether due notice had been given the city. The trial court held that there had been no proof of the due service of such notice on the proper city officials, and no waiver of such proof by defendant. But we think that under the pleadings it was not necessary to offer evidence of the giving of notice. The complaint alleged: "That on the 12th day of June, 1911, the plaintiff caused due notice of the time, place and manner and circumstances of the injuries to said John W. Vills to be given to the city council of city of Cloquet, and to the clerk and mayor of said city, pursuant to the provisions of law in such case made and provided." The answer: "Admits that the plaintiff caused a purported notice of injury, stating the time, place and manner and circumstances of said injury, to be given to the city council of the city of Cloquet and to the clerk and mayor of said city."

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It seems to us that this admission must be construed as admitting the service of notice on the day alleged in the complaint. Perhaps it put in issue the sufficiency of the notice as to its contents, but it surely admitted its service on the council, clerk and mayor, and in the absence of words to indicate that the time of the service was called in question, we must hold that the admission dispensed with the necessity of proof of the due service of the notice. As to its contents, it was offered in evidence, received without objection, and was clearly sufficient. No point was made at any stage of the proceedings that the notice was not served as alleged in the complaint. We are satisfied that there was no good reason for granting a new trial on this issue, and the order granting such new trial must be reversed.

The order denying judgment notwithstanding the verdict and denying a new trial is affirmed. The order granting a new trial on the issue of notice to the city is reversed, with directions to the trial court to enter judgment on the verdict.

ARTHUR H. PATTERSON v. EDMON ADAN.[1]

November 1, 1912.

Nos. 17,728—(57).

Master and servant — negligent driving of automobile.

In an action by a servant against his master, for injuries received by reason of the negligence of the latter in the operation of an automobile in which the servant was riding pursuant to the order and direction of the master, it is *held* that the evidence upon the question of the master's negligence in operating the car, the question of the servant's assumption of risk and contributory negligence, presented issues of fact for the jury to determine, and that the verdict is supported by sufficient competent evidence.

[1] Reported in 137 N. W. 1112.

Note.—As to liability generally for injury to passenger by negligent operation of automobile, see notes in 21 L.R.A.(N.S.) 81; 35 L.R.A.(N.S.) 658.

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New trial.

There were no errors in the instructions or refusals to instruct, and the court did not abuse its discretion in denying a new trial on the ground of misconduct of counsel.

Action in the district court for Ramsey county to recover $21,000 for personal injuries. The answer alleged that, prior to the accident, plaintiff requested defendant to permit him to ride in defendant's automobile for the pleasure and convenience of plaintiff, and at the time of the accident plaintiff was so riding voluntarily for his own satisfaction and convenience and at his own risk, and denied that the accident occurred through any fault or negligence of defendant. The reply denied the new matter contained in the answer.

The case was tried before Hallam, J., who denied defendant's motion for a directed verdict, and a jury which returned a verdict in favor of plaintiff for $4,500. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Harris Richardson and *Walter Richardson,* for appellant.

C. D. & R. D. O'Brien, for respondent.

Brown, J.

Action for personal injuries in which plaintiff had a verdict, and defendant appealed from an order denying his alternative motion for judgment or a new trial.

The evidence justified the jury in finding the following facts: Defendant owned and operated a place of business at Bass Lake, near the city of St. Paul. Defendant also owned an automobile and used the same in going to and returning from St. Paul to his said place of business. Plaintiff was in his employ, as a chauffeur, electrician and engineer, and was thoroughly familiar with automobiles and was a competent driver. On the early morning of February 13, 1910, defendant ordered plaintiff to accompany him in said automobile from Bass Lake to the city of Minneapolis. In compliance with such directions plaintiff took his place in the automobile, defendant driving the car. The roads and streets were covered with an accumulation

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of ice and snow, were rough and slippery, and extremely dangerous for the use of such a vehicle. At a point on University Avenue, in the city of St. Paul, the automobile was overturned and plaintiff received severe injuries.

1. Our examination of the record leads to the conclusion that the evidence fully justified the jury in finding that the reckless and careless driving of the automobile by defendant was the direct cause of the accident, and of a nature to charge him with liability in this action, unless plaintiff was chargeable with contributory negligence or, in accompanying defendant under the circumstances shown, assumed the risk of injury likely to result from his operation of the car.

2. Whether plaintiff directly contributed to his injury or assumed the risk were, on the evidence presented, questions of fact and properly submitted to the jury. It is claimed by defendant that he was intoxicated at the time, a fact known to plaintiff, and that plaintiff took the chances of a safe passage to Minneapolis, and cannot now complain. It may be conceded for the purposes of the case that defendant was somewhat under the influence of liquor, and that plaintiff knew it. But from that it does not necessarily follow, as a matter of law, that plaintiff was guilty of contributory negligence or that he assumed the risk of injury by complying with defendant's order and direction to accompany him in the automobile to Minneapolis. The relation of master and servant existed between the parties. Plaintiff was the servant, and, unless defendant was so badly intoxicated as to be incapable of properly running the car, plaintiff's duty, as such servant, was to obey the order of the master. The defendant, the master, is in no very favorable situation to resist liability under such circumstances, or to be heard to complain that the servant obeyed his orders. There is no claim that defendant was not competent to drive the car, the only point made is with reference to his intoxicated condition which, it is claimed, incapacitated him for the time being properly to operate the car. It was also claimed on the trial that plaintiff accompanied defendant on his own motion, and that defendant neither ordered nor requested him to do so. We have read the record fully, and conclude that the evidence upon this, as well as upon all other disputed questions, presented issues of fact for the

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jury to determine. It would serve no useful purpose to discuss the evidence in detail. We sustain the action of the trial court in upholding the verdict.

3. The instructions of the court sufficiently covered all the issues presented by the pleadings and evidence and there was no error therein, nor in the refusal of certain requests submitted by defendant.

4. The question whether a new trial should be granted because of misconduct of counsel rests in the sound discretion of the trial court, in the exercise of which in this case we discover no abuse. The remarks complained of might well have been omitted, but we concur in the view of the trial judge that no prejudice resulted therefrom.

Order affirmed.

BUNN, J., before whom the first trial was held, took no part.

JOHN McLOONE and Another v. CHARLES J. H. BRUSCH.[1]

November 1, 1912.

Nos. 17,818—(138).

Written contract — parol evidence admissible.

The written executory order for the shipment of goods to defendant, set out in the opinion, held not on its face a complete expression of the contract between the parties, and that evidence of a contemporaneous parol warranty of the goods was admissible. Aultman, Miller & Co. v. Clifford, 55 Minn. 159; Phœnix Pub. Co. v. Riverside Clothing Co. 54 Minn. 205; and Boynton Furnace Co. v. Clark, 42 Minn. 335, followed and applied.

Action in the district court for Waseca county to recover $145.75, the balance due upon the price of a corn husker, and freight thereon from the factory to Waseca. At the trial, the parties stipulated in open court that, if oral testimony was admissible to establish the allegations of the answer relative to terms of purchase not set forth in

[1] Reported in 138 N. W. 35.

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the written order set out in the opinion, then the defendant was to have a verdict directed in his favor; if not, then the plaintiffs were to have a verdict directed in their favor for the amount demanded. The trial court, Childress, J., held such evidence admissible and directed a verdict in favor of defendant. From an order denying plaintiffs' motion for judgment notwithstanding the verdict or for a new trial, plaintiffs appealed. Affirmed.

Moonan & Moonan, for appellants.

F. B. Andrews and *F. W. Senn,* for respondent.

BROWN, J.

Action to recover the purchase price of a corn shredder, in which defendant had a verdict, and plaintiff appealed from an order denying a new trial.

The action was founded upon an instrument in the following language, namely:

"Waseca, Minn. Oct. 14, 1910.

"The undersigned orders of McLoone, Priebe & Company of Waseca: One two-roll Adams Corn Shredder, complete with cutter head, for the sum of one hundred sixty dollars ($160.00), terms thirty (30) days, this shredder to be f. o. b. factory.

"Charles J. H. Brusch."

Defendant interposed in defense an oral warranty of the soundness of the shredder, made at the time the order therefor was given, a breach thereof and resulting damages. When the cause came on for trial in the court below the parties entered into a stipulation to the effect that, if evidence of the alleged parol warranty was admissible, over plaintiff's objection that it would vary and add to the written contract, a verdict should be by the court directed in defendant's favor; and that if such evidence was held inadmissible a verdict should be directed for plaintiff for the purchase price of the machine. The trial court held the evidence admissible and, in harmony with the stipulation, directed a verdict for defendant. Plaintiff appealed from an order denying a new trial.

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The only question presented on this appeal is the correctness of the ruling of the trial court under the stipulation. In other words, whether the order, set out in full above, is a complete contract between the parties to which the rule excluding parol evidence modifying or adding to its provisions applies.

The question is not, from the standpoint of previous decisions of the court, entirely free from doubt. Within the rule applied in Wemple v. Knopf, 15 Minn. 355 (440); Kessler v. Smith, 42 Minn. 494, 44 N. W. 794; and American Mnfg. Co. v. Klarquist, 47 Minn. 344, 50 N. W. 243, the evidence would be inadmissible. In each of those cases the court had before it a written order for the shipment of the goods, which was either formally accepted in writing or by the shipment of the property ordered, and it was held that the order constituted a complete contract which could not be added to by parol. On the other hand, in Boynton Furnace Co. v. Clark, 42 Minn. 335, 44 N. W. 121; Phoenix Pub. Co. v. Riverside Clothing Co. 54 Minn. 205, 55 N. W. 912; Aultman, Miller & Co. v. Clifford, 55 Minn. 159, 56 N. W. 593; Potter v. Easton, 82 Minn. 247, 84 N. W. 1011; Hand v. Ryan Drug Co. 63 Minn. 539, 65 N. W. 1081, a parol modification was permitted. The first three of the cases just referred to involved an order for goods for all practical purposes identical with the order in the case at bar, and it was held that the orders were not complete upon their face and a parol warranty was admitted. The other two citations involved the same question, and parol evidence in modification was held properly admitted by the trial court. No attempt has been made to distinguish the cases referred to, and we make no effort in that direction at this time. We follow and apply the rule of the later decisions, and hold, in the language of the Chief Justice in Potter v. Easton, supra, that it is manifest that the parties did not intend the order in question as a complete expression of their contract, and evidence of the parol warranty was admissible. Of course the negotiations, facts and circumstances surrounding the giving of an order of this kind might lead to the conclusion that the whole contract was intended by the parties to be expressed in the order. But

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the negotiations leading up to this order are not disclosed by the record; the evidence, if any was taken on the trial below, is not returned.

Order affirmed.

FRED MEIER v. NORTHWEST THRESHER COMPANY.[1]

November 1, 1912.

Nos. 17,819—(198).

Chattel mortgage construed — earnings from machinery sold.

A provision of a mortgage executed to secure the purchase price of threshing machinery, that the gross earnings of the machinery should be paid to the mortgagee, free from operation liens, but that forty per cent of the earnings so received by the mortgagee should by it be paid to the mortgagor for operation expenses, construed and *held* to give the mortgagor an immediate and absolute right to forty per cent of the proceeds, less expense of collection of certain threshing accounts assigned by him, pursuant to the terms of the mortgage, to the mortgagor and by it collected.

Operation expenses — recovery from mortgagee.

Transaction in which the said claims were assigned to the mortgagee, considered and *held* to import a direction from the mortgagor to the mortgagee to pay certain debts due, at the time of such assignment, from the mortgagor to the plaintiff and his assignors for labor performed in connection with the operation of the said machinery, so that the plaintiff had the right to recover from the mortgagee that proportion of the proceeds of the assigned accounts which, by the terms of the mortgage, belonged to the mortgagor for operating expenses.

Action in the district court for Waseca county to recover $113.50 upon six causes of action for work and labor performed by plaintiff and his assignors. The facts are stated in the opinion. The complaint alleged that defendant requested Wolter to turn over to it for

[1] Reported in 138 N. W. 36.

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collection all accounts for threshing done by him during the fall of 1908, while plaintiff and his assignors were working about the machine, and particularly agreed that in consideration of doing this, defendant would pay to each of the persons named the amount due them for such work and labor performed; that Wolter turned over the accounts; that defendant collected from them a sum greatly in excess of the amount due to the persons named, which defendant promised to pay. The answer denied the foregoing allegations, and set up the terms of the chattel mortgage mentioned in the opinion as the only agreement as to the division of earnings ever made between Wolter and defendant. The reply was a general denial.

The case was tried before Childress, J., who denied plaintiff's motion for a directed verdict and granted defendant's motion for a directed verdict. From an order denying his motion for judgment in his favor notwithstanding the verdict or for a new trial, plaintiff appealed. Reversed and new trial granted.

Moonan & Moonan, for appellant.

P. McGovern and *S. B. McBeath,* for respondent.

Philip E. Brown, J.

Action to recover $113.50, with interest, for labor performed by the plaintiff and others whose claims have been assigned to him, in the operation of threshing machinery owned and operated by one Lawrence Wolter. On the trial of the cause to a jury, both parties having moved for a verdict, by the court's direction the jury returned a verdict for the defendant. This is an appeal by the plaintiff from an order denying his alternative motion for judgment or for a new trial.

It appears that, in the year 1906, the said Wolter, in order to secure the payment of a part of the purchase price, namely, $2,583.75, of a threshing rig bought by him from the defendant, executed to the latter a chattel mortgage thereon; and for further security all of the gross earnings of the machinery during the years 1906, 1907, and 1908, and until the purchase price was paid, were by the terms of the said mortgage assigned and mortgaged to the defendant, and it was thereby agreed that such gross earnings should include the earn-

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ings, and proceeds of the earnings, of all persons, teams, and vehicles, necessary as an entire complement of labor employed in the operation of threshing done by the mortgagor during the said years, in the township wherein he then resided or elsewhere in this state. The defendant agreed therein to deliver to the mortgagor or to his order, upon request, forty per cent of the said gross earnings received by it, for the use of the mortgagor in defraying the operating expenses of the machinery, and it was further stipulated that the defendant at its option should "select, in whatever form said gross earnings may be received or held by it, said proportion to be so delivered" to the mortgagor. Finally, the mortgagor covenanted that the gross earnings so mortgaged to the defendant should be exempt from all liens, charges, and expenses incident to the operations of threshing and that all such liens, etc., should be paid by him; and further that he would keep a written statement containing the name and address of each person for whom threshing was done, the date thereof, and the amount earned, and subject to the defendant's inspection; and also that settlement of the gross earnings mortgaged should be made by him for each threshing job done, and that the mortgagor would procure signed acceptances thereof and would turn the same over to the defendant, or its agent, for collection, upon the condition that all moneys so collected were to be applied on the mortgage indebtedness, less the cost of collection, the defendant not to be liable, however, for any accepted settlements so long as the same remained unpaid. The mortgage contained other stipulations not here material.

Wolter operated the machinery under this agreement in the years 1906 and 1907, turning over the threshing accounts to the defendant from time to time thereunder, to be applied on his mortgage indebtedness, and continued to operate the rig up to September 14, 1908, when the separator of the machinery was destroyed by fire. He was then indebted to the plaintiff and to other persons named in the complaint for labor performed in operating the rig, in the sum of $113.50. Shortly thereafter Wolter assigned to the defendant, at the instance of one Eustice, the defendant's collector, without any consideration further than those specified by the mortgage, threshing accounts earned with the machinery in 1908, to the amount of $268.31, of which the

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defendant collected and retained the sum of $248.89. Wolter did not turn over to the defendant all the accounts for the earnings of the machinery for threshing done in 1908.

The plaintiff claims that, when Wolter assigned the accounts mentioned to the defendant in 1908, as a consideration therefor it was agreed between Eustice and Wolter that the defendant would pay all the claims for operating expenses of the threshing machinery, and there is in the record sufficient evidence of the actual making of the agreement between Eustice and Wolter to make this question one of fact for the jury. It is further claimed by the plaintiff that, under the doctrine of implied or apparent authority and also of ratification, this agreement was binding upon the defendant. It is also claimed by the plaintiff that the chattel mortgage as to the earnings of the machinery was void. All of these claims are controverted by the defendant.

1. In order to determine the questions as to the authority of the defendant's collector, Eustice, and the binding effect of his alleged agreement upon the defendant, it is necessary briefly to consider the relevant relations between Wolter and the defendant under and by virtue of the mortgage. As stated, the plaintiff claims, or, to be more exact, suggests the invalidity of the mortgage of the earnings as to the plaintiff and his assignors. The defendant, on the other hand, insists upon the validity of the mortgage. In view, however, of the fact that this question, notwithstanding its general importance, has been left by the parties to this appeal practically without argument, and furthermore, because it is by no means clear that the upholding of this plaintiff's contention could affect the conclusions reached, we will, for the purposes of this case, both now and hereafter, sustain the defendant's contention on this point, and hold that the mortgage is valid as between the parties thereto, and also as against this plaintiff and his assignors described in the complaint.

2. This brings us to the consideration of the rights of the parties to the mortgage. The instrument is ambiguous in its terms and of such a nature that, so far as the defendant is concerned, the latter is not entitled to any other than a strict construction thereof, and its purpose must be held to be primarily to secure Wolter's obligations to the defendant, but with such stipulated allowance of the earnings of

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the machinery to Wolter as would enable him to carry on the business of threshing. Accordingly, under the familiar rule that equity regards as done what ought to be done, as soon as a threshing account was earned the lien of the mortgage attached thereto, and under a fair construction of the instrument forty per cent of such account when collected, less the expense, perhaps, of its collection incurred by the defendant, became the absolute property of Wolter, and this amount the defendant was, by the terms of the mortgage, obligated to pay to Wolter or to his order. And from this it follows that the trial court erred in directing a verdict for the defendant; for, though we cannot sustain the plaintiff's contention that Eustice had implied or apparent authority to bind the defendant by the agreement alleged to have been made at the time of the assignment of $268.31 in accounts to the defendant, as above mentioned, Wolter being charged with knowledge of the terms of the mortgage, and there being nothing in the evidence or in the record to indicate that Eustice was authorized to do more than to proceed to take assignments of the accounts pursuant to the provisions of the mortgage, or that he had any authority other than might be inferred from such provisions in the instrument under which the parties had been acting for two seasons; and though it cannot be held that the defendant ratified the said agreement between Eustice and Wolter by collecting the accounts in connection with the assignment of which such agreement is alleged to have been made, or by retaining their proceeds, there being nothing in the record to show that the defendant had any knowledge of the alleged agreement prior to the bringing of this action; yet, in view of the construction which we have above placed upon the mortgage, the transaction between Eustice and Wolter in which the said accounts were assigned to the defendant must be considered to import at least a direction by Wolter to the defendant to pay the former's forty per cent of the accounts collected by the latter to the plaintiff and the other laborers mentioned in the complaint. This direction was binding upon the defendant, and for its failure to comply therewith the defendant is answerable to the plaintiff in this action.

If this case be tried again it should be remembered that this is not an action between the company and Wolter, and that no consideration

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of any general indebtedness from the latter to the former is material, and, furthermore, that the plaintiff can recover in this action only the amount of the labor claims set out in the complaint, less any sums which may have been paid upon any of such claims, and that in no event can he, in this action, recover more than forty per cent of the assigned accounts unless he should establish a valid agreement by the defendant to pay more.

Order reversed and a new trial granted.

MARY ANN McELENEY and Others v. ELIZABETH DONOVAN and Another.[1]

November 8, 1912.

Nos. 17,650—(45).

Cancelation of deed — evidence.

In this an action to set aside a deed to a daughter of the grantor, the evidence sustains the finding of the jury that the grantor was competent, and also that no undue influence was exerted upon him.

Opinion evidence.

A witness who has had business transactions with a person, has known him, and observed and talked with him, may, after having detailed the business had and observations made of such person, properly give an opinion concerning his mental state.

Conversations with decedent — who may testify to.

A child of the grantee in the deed sought to be set aside is not an interested party, prohibited by the statute from testifying to conversations between the deceased grantor and his son.

Burden of proof — undue influence.

The jury were properly instructed that the burden was on plaintiff to prove the incompetency of grantor and the undue influence alleged; also

[1] Reported in 138 N. W. 306.

Note. —As to opinion evidence by nonexpert as to the testamentary capacity of another, see note in 37 L.R.A.(N.S.) 595.

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that there was not any evidence of fiduciary relations, or relations of confidence and trust, between grantor and grantee, that would give rise to the presumption that undue influence had been used by or in behalf of the grantee.

Assignments of error.

Other assigned errors examined, and found without merit.

Action in the district court for Waseca county to set aside a certain deed from Michael McGonagle, deceased, to defendant Elizabeth Donovan and for an accounting of rents and profits. The complaint alleged that the execution of the conveyance was procured solely by the exercise of undue influence practised upon the grantor by defendants; that at the time of the execution the grantor was not mentally competent to understand the effect or nature of his act; and that it was not his voluntary act and he was not a free agent. The answer admitted the execution of the deed, but denied the foregoing allegations. The case was tried before Childress, J., and a jury which returned answers to the special questions submitted to it, as stated at page 296. From an order denying plaintiffs' motion for judgment in their favor, notwithstanding the verdict, or for a new trial, they appealed. Affirmed.

R. T. Boardman, P. McGovern and *Henry M. Gallagher*, for appellants.

Moonan & Moonan, E. B. Collester and *Charles Spillane*, for respondents.

HOLT, J.

Action to set aside a conveyance on the ground that it was obtained by undue influence, and that the grantor was mentally incompetent at the time of its execution. Both issues were submitted to a jury, and answered in defendants' favor. The appeal is from an order denying plaintiffs a new trial.

The plaintiffs are three daughters of Michael McGonagle, the grantor in the deed sought to be annulled. The defendant Elizabeth Donovan is his youngest daughter, and the grantee in the deed.

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The other defendant is her husband. The grantor died December 26, 1910, at the age of eighty-five years, leaving four sons, four daughters, and the children of a deceased son as his heirs. As the sons started out for themselves, he had given each a farm. He retained the 200-acre farm he had conducted while the family was growing up, and had evidently determined to give that to his four daughters, in addition to $500 given to each, except the defendant Elizabeth, who then received only $300; for he had made two wills and a codicil to that effect. The first will was made about eleven years, and the codicil to the second two or three years, prior to his death. His wife died twelve or thirteen years before he did, and soon after he rented out the farm, and had made his home with defendant for the last eleven years of his life. He was on very friendly terms with all the children, and made them visits, some of these lasting for several months. About November 1, 1910, advancing age and impaired heart action confined him to the house. Because of bronchial trouble and the weak heart, he was for the most part, in November and December, 1910, compelled to sleep in a chair. On the nineteenth of November he signed a deed to the land, wherein the defendant, Elizabeth, was grantee; but four days later, becoming dissatisfied because he had made no reservation for himself, the deed in suit was executed, wherein it was stipulated that he should have $200 a year from the rent of the farm, and the rent of one forty should go to the son John, who was mentally weak, for life.

The errors assigned are: That the verdict is not justified by the evidence, and contrary to law; erroneous rulings on the admission of certain testimony; objectionable instructions to the jury; and refusal to give a requested instruction.

The execution of the deed by the grantor was one of the questions submitted to the jury, although this was alleged in the complaint and admitted in the answer. Therefore the assignment of error that the verdict is not justified by the evidence must be confined to the answers given to the other two questions submitted, viz.:

"Was Michael McGonagle of sufficient mental capacity to make a deed on the twenty-third of November, 1910?" Answer: Yes.

"If you find that Michael McGonagle did execute said deed, and

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was of mental capacity to make such deed, was said deed procured by undue influence, exerted upon him by defendants, or either of them?" Answer: No.

It is sufficient to say that his attending physician, present at the time, and another physician of his acquaintance, who saw him at about the days on which the deeds were executed, the two different attorneys whom he consulted about the transaction, and who prepared, witnessed, and took the acknowledgment of the deeds, testify to his mental competency to transact his business. These are also corroborated by neighbors, attending nurses, and acquaintances. To be sure, there is evidence from plaintiffs' two sons, and one or two other persons, that the grantor, upon the nineteenth and twenty-third of November, 1910, was in a stupor, did not take notice of what was being done, and did not recognize those about him.

We cannot escape the conviction, after a careful reading of the evidence, that it would have been extremely difficult for a jury to have reached any other conclusion than that Mr. McGonagle was mentally competent to transact his own business when he made the conveyance. The same may almost as confidently be asserted in support of the jury's finding on the proposition of undue influence. The son, who usually assisted the grantor in important transactions, knew of the deed within a day or two after it was made. He remonstrated neither with his father nor defendants. The old gentleman had made his home with defendants for more than eleven years, was attached to the children in the family, knew that his youngest daughter and her husband had had sickness and financial reverses to contend with, and it was not strange that he should come to the conclusion that this daughter was in more need of his bounty than the other children. That defendants may have been anxious to get the farm is undoubtedly true; also that they were not eager to start the storm, which was sure to come when the other children ascertained what had been done, by telling them about it; but this desire and secrecy do not necessarily prove that undue influence was used. The jury having found, on conflicting evidence that no undue influence was used by either of defendants, and this having been approved

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by the trial court, we are clear that the record does not justify us in disturbing such finding.

The errors assigned as to rulings on the admission of testimony do not appear substantial. Thus, on objection, the attorney who prepared the deed, when called as a witness by plaintiffs, was not permitted to answer the question: "Did he give you any reason for disinheriting all his children, and giving all his property to one?" But he was required to answer this, which appears to us a more proper question: "Did or did not he state any reason why he made the deed at this time?" Witnesses who had known the grantor for a long time, and had had business or professional transactions with him, after testifying to these, were permitted to express their judgment as to his mental condition, and we think rightly so. Woodcock v. Johnson, 36 Minn. 217, 30 N. W. 894; In re Pinney's Will, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144.

A daughter of defendant was allowed to testify to a conversation she overheard between the grantor and his son Michael, over plaintiffs' objection that she, being an interested party, could not testify to a conversation between the deceased grantor and his son, and for the further reason that the statute prevents the son from refuting her testimony. In 40 Cyc. 2285, it is stated: "Nor is a witness so interested as to be disqualified merely because, as heir to a living party to the suit, he may ultimately share in the property to which the suit relates"—citing Harraway v. Harraway, 136 Ala. 499, 34 South. 836, and Boyd v. Boyd, 163 Ill. 611, 45 N. E. 118.

No specific mention need be made of any other rulings assigned as error, for a mere inspection of the record proves them devoid of merit.

As to the instructions complained of, one is that the court, after stating to the jury that the questions submitted were to be answered simply by "Yes" or "No," continued: "When you have returned your answers, then the court will go all over the evidence and all over the case, and determine whether or not the deed should be set aside. It will be in the final analysis of the case a question for the court to decide; but those particular issues are to be submitted to the jury for your determination first. Of course, the court will be governed by the answers which the jury makes to those particular questions

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in determining whether or not the facts relating to those questions are true or not." The appellants urge that, even including the last sentence, they were prejudiced, because the jury were virtually told that their verdict was of no great consequence to the litigants, because the court was the final arbiter. It is perhaps as difficult to discern the purpose of the instruction as to point out wherein either litigant was prejudiced thereby.

The court, in effect, charged that the burden was on plaintiffs to show that the grantor was not of sound mind when the deed was executed, as well as to establish the use of undue influence in its procurement, and refused to give an instruction that, if they found that a relationship of confidence and trust existed between the father and daughter, then the burden would fall on defendants to show that the daughter took no advantage of the father in her own interest, and not on plaintiffs to prove that defendants, or either of them, had unduly influenced the father, or that he was not competent to transact any business, but instead instructed that there was no evidence of any fiduciary relations between the father and defendants.

The action is to set aside a deed on the ground that the grantor was not competent to transact business and the grantee used undue influence. A deed, duly witnessed and acknowledged by a grantor, is proof that whatever title the grantor had and purported to convey vested in the grantee, without any further testimony as to the mental condition of the grantor; and the burden is undoubtedly on the one who seeks to have the deed annulled to prove the facts upon which the action is predicated. Counsel admits this general rule, but contends that in this case certain facts and circumstances appeared which shifted the burden of proof to the defendants, and the court should have so charged the jury.

We doubt whether any practical gain is made in the administration of justice by the adoption of a rule requiring a jury to stop at intervals in the trial to determine which litigant wins if the trial there ends. The minds of jurors differ. One may conclude a fact is proven, when the others are still doubting or unconvinced. In a certain sense, during the trial of the case, the burden continually shifts or changes, in that after one witness has testified the court or jury

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might conclude that, if there was no further proof, the facts testified to by such witness are established; but, as other witnesses are heard, the conclusion first arrived at is overcome. It is also true that the proof of certain facts in a trial may give rise to presumptions of the existence of an ultimate fact or issue necessary to establish, and that, unless evidence is then adduced to overcome such presumption, the case ends. This is sometimes referred to as shifting of the burden of proof, but we think improperly. The fact is, the burden in every cases rests on the litigant who has the affirmative of an issue to prove it; otherwise, his opponent wins. It seems neither useful nor proper to inquire how he maintained this burden at any particular stage in the trial. The important consideration is: Where is he left when all the evidence is in? Does the fair preponderance thereof then establish the issues he by his pleadings undertook to establish?

Tyner v. Varien, 97 Minn. 181, 106 N. W. 898; Fischer v. Sperl, 94 Minn. 421, 103 N. W. 502, and Clarity v. Davis, 92 Minn. 60, 99 N. W. 363, relate to wills, where, of course, the burden is upon proponent to establish the will by proof that it is the act of a testator who was then capable and competent; but we do not think the effect of these decisions is to support appellants' contention. In an action of this kind the burden is always on the plaintiff to prove the undue influence or incompetency alleged. Mr. Justice Bunn, in Howard v. Farr, 115 Minn. 86, 131 N. W. 1071, said: "There is no reason for not applying the familiar rule that the party who seeks to set aside a solemn instrument like a deed on the ground of fraud or undue influence, which is a species of fraud, has the burden of proof." Such is also the rule in Prescott v. Johnson, 91 Minn. 273, 97 N. W. 891; Rader v. Rader, 108 Minn. 139, 121 N. W. 393, and Naeseth v. Hommedal, 109 Minn. 153, 123 N. W. 287.

We conclude the court was right in stating to the jury that there was no proof of any fiduciary relations between grantor and grantee in the deed. This term is sometimes used as equivalent to confidential relations, but perhaps not accurately; for the former arise from some trust, either voluntarily assumed by one person toward another, or by law imposed. The relation between parent and child

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is also spoken of as one of confidence and trust. But we have not found or been directed to any decision holding that, upon it being shown that the relation of parent and child exists between donor and donee, the presumption of undue influence follows. The existence of the relationship is an important factor to consider, and must cause the court or jury to carefully scrutinize the evidence, to see whether an advantage has been taken by the donee over the donor by reason thereof. We think that, before presumptions of undue influence may be drawn from the fact that a donee is the child of the donor, it must appear that such donee stood to the donor in a relation other than the ordinary intimate, and even affectionate, relation existing between parent and child. It must be shown that the donee occupied a position to dominate the donor, or exert an influence over him, by virtue of being intrusted with the donor's business affairs.

In this case it does appear that, if any relationship of trust and confidence in relation to business affairs existed between the father and any of the children, such child was the son Michael, who was informed of the deed soon after its execution. The defendants never appeared to have attended to the father's business, nor to have taken charge of any of his valuable papers, nor to have advised him in regard to his business affairs. The inference is strong that the father had not leaned so much on the daughter as she on him. The dutiful care which this daughter rendered her father, the friendly assistance in the matter of noting down what his desires were when his defect of speech prevented others from fully understanding him, and the alacrity with which she and her children did his bidding when informed that he wanted to deed the farm to her, fall short of showing such confidence and trust between the parent and child that a presumption of undue influence arises, under the rule announced in Ashton v. Thompson, 32 Minn. 25, 18 N. W. 918, and the authorities generally.

We discover no prejudicial error in the record.

Order affirmed.

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W. H. FERRELL & COMPANY v. GREAT NORTHERN RAILWAY COMPANY.[1]

November 8, 1912.

Nos. 17,702—(38).

Contract to supply cars to shipper.

A contract by a common carrier to supply to a particular interstate shipper a specified number of cars on certain dates, to be used in such shipment, is not a violation of the act of Congress regulating interstate commerce, unless it appear that the contract, if performed, will in fact extend to that shipper an undue or unreasonable preference over other shippers.

Judgment notwithstanding verdict — evidence.

Evidence *held* sufficient to support the verdict; and, though perhaps indefinite in some respects, defendant is not, under the rule of Cruikshank v. St. Paul F. & M. Ins. Co. 75 Minn. 266, entitled to judgment notwithstanding the verdict.

Action in the district court for Mille Lacs county upon twenty-three causes of action to recover $46,525 for breach of contract to furnish refrigerator cars for the shipment of potatoes at the several stations mentioned in the complaint. The answer specifically denied that defendant ever agreed to furnish plaintiffs cars for shipment of potatoes in the numbers, or at the times, stated in the complaint, and alleged no sufficient or lawful demand was ever made by plaintiff for the shipment of potatoes as required by the laws of the state. It also alleged that defendant furnished cars as quickly as it was physically possible for it to do under the circumstances, whenever cars were required by plaintiff. The reply denied the new matter alleged in the answer. At the beginning of the trial plaintiff was allowed to dismiss eight causes of action. The case was tried before Nye, J., and a jury which returned a verdict for $5,500 in favor of plaintiff. Defendant's motion for judgment notwithstanding the ver-

[1] Reported in 138 N. W. 284.

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dict was denied. From the judgment entered pursuant to the verdict, defendant appealed. Affirmed.

James E. Markham and *M. L. Countryman,* for appellant.

Stiles & Devaney and *E. L. McMillan,* for respondent.

BROWN, J.

Action to recover damages for the breach of an alleged contract to furnish refrigerator cars for the shipment of certain property, in which plaintiff had a verdict, and defendant appealed from the judgment rendered thereon after a denial of its motion for judgment notwithstanding the verdict. The case was before us on a former appeal, where it was held that the complaint stated a cause of action for breach of contract. 114 Minn. 531, 131 N. W. 1135. We follow that decision.

It is unnecessary to set out the allegations of the complaint at length, or the proceedings preliminary to the commencement of the trial. While the complaint contains several causes of action, predicated upon distinct grounds, the trial court required plaintiff to elect upon which ground it would rely for recovery, and plaintiff elected to rely upon the breach of an express contract to furnish the cars. The trial so proceeded, and was confined to a definite number of the several causes of action stated in the complaint; all others being dismissed or abandoned. The facts, so far as necessary to an understanding of the questions presented, are as follows:

Plaintiff is a Minnesota corporation, an extensive dealer in and shipper of Minnesota potatoes, and owns warehouses for storage purposes at several stations along defendant's road between St. Paul and Duluth. In January, 1910, plaintiff had in storage in its said warehouses a large quantity of potatoes for shipment to the Southern and Southwestern markets, requiring for their transportation in the neighborhood of two-hundred refrigerator cars. Plaintiff filed with local agents of defendant orders for a specified number of cars, designating the number and the station at which they were required. One of these orders was so presented on January 13, and called for one hundred cars, on the dates and at the stations therein named. Some

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of the cars so ordered were furnished by defendant, namely, sixty-one. On January 28 plaintiff presented another order for additional cars, under which no cars were furnished. There seems to have been some delay in the matter, and, being anxious to get their potatoes to the Southern market, plaintiff's general manager personally visited the traffic manager of the road on January 31, and it is claimed by plaintiff that a contract was then entered into, by which defendant undertook and agreed to furnish at the times and stations designated by plaintiff the necessary number of cars required for the shipment of the potatoes plaintiff then had on hand. The cars were not furnished, and the potatoes could not be shipped out, and plaintiff claims that, in consequence of defendant's failure, plaintiff suffered a loss by reason of a drop in the market price of potatoes, for which it seeks to recover in this action. Defendant denied making the contract, and whether it was made presented one of the principal issues on the trial below. Plaintiff's right to recover was thus placed entirely upon the alleged contract, and not in any view upon a claim of the violation of defendant's common-law or statutory duty to furnish the cars.

1. It is contended by defendant that the evidence wholly fails to sustain the claim of an express contract, and that the court below erred in denying its motion for a directed verdict, and also in denying its motion for judgment notwithstanding the verdict. Our examination of the record results in the conclusion that the evidence sufficiently supports the verdict, within the rule guiding us in such cases.

It is not disputed that plaintiff's manager, Ferrell, called upon defendant's general traffic manager, Broughton, on or about January 31, in reference to providing cars under the orders previously made by plaintiff, and no dispute but that the traffic manager referred plaintiff's representative to Mr. Beidelman, an agent of defendant having in charge its refrigerator car service. Nor is it disputed that those persons then had some negotiations and discussion in reference to the subject. Plaintiff claims, and Farrell so testified, that the former orders for cars were then before the parties, and that Beidelman expressly agreed to provide the cars so ordered. Beidelman de-

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nied the express agreement, and testified that he agreed to furnish the cars just as soon as they could be had; that there was a car shortage at the time, and that the company was providing and sending to the use of plaintiff as rapidly as possible all available cars. The testimony offered by plaintiff was sufficient, if believed by the jury, to establish the alleged contract. If it may be said that the question is doubtful on the evidence taken as a whole, the doubt, so far as this court is concerned, was solved by the action of the trial court in upholding the verdict of the jury. The evidence is not so clearly against the conclusion of the jury to justify this court in ordering final judgment against plaintiff. Cruikshank v. St. Paul F. & M. Ins. Co. 75 Minn. 266, 77 N. W. 958.

It was not, of course, the understanding, on January 31, that the cars were to be furnished on the dates specified in the prior orders, for the dates therein named had passed. But it was a fair question whether it was not understood between the parties that the number of cars to be thereafter furnished was to correspond with the number called for by those orders, namely, a certain number per day at the stations named. The company was then informed of the number of carloads of potatoes plaintiff had in readiness for shipment, and the jury was fully justified in concluding that the parties agreed and understood that cars should be furnished in harmony with the previous order except as to dates. The evidence was also sufficient to justify the jury in finding a breach of the contract, and a failure to supply the cars contracted for.

We find no substantial variance between the allegations of the complaint and the evidence, respecting the number of cars required or ordered by plaintiff at the different stations, and the amount awarded by the verdict was clearly within the evidence. Since, therefore, plaintiff's evidence established the alleged contract, the breach thereof, and resulting damage, plaintiff was entitled to recover, and the verdict must be sustained, unless the further contention of defendant, namely, that the contract was void and unenforceable, because an unlawful discrimination in plaintiff's favor, be sustained.

2. The cars required by plaintiff were for interstate trade; the potatoes being shipped to points beyond the state. It is contended by

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defendant in this connection that the alleged contract, conceding it to have been entered into as claimed by plaintiff, was upon its face a violation of the Federal statutes regulating interstate commerce, and therefore void, and for that reason judgment should have been ordered for defendant. The part of the act of Congress bearing upon this question is found in section 3 of the Interstate Commerce Act, approved February 4, 1887 (24 St. 380), where it is provided "that it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever or to subject any particular person, company, firm, corporation, or locality or any particular description of traffic, to any undue or unreasonable prejudice, or disadvantage in any respect whatsoever." Substantially the same provisions are found in the statutes of the state. Section 2009, R. L. 1905.

There can be no serious question that the intention of the act of Congress, as well as the state statute, was to afford all shippers a fair opportunity and equal privilege in the use of cars for the shipment of their commodities, and to that end all undue and unreasonable discrimination is thereby expressly prohibited. But it does not follow, necessarily and as a matter of law, that a contract by a carrier to furnish a particular shipper a definite number of cars on specified days in the future is a violation of either the letter or spirit of the law, in the absence of a showing of a discrimination or an undue or unreasonable advantage in fact. Notwithstanding the performance of such a contract may necessitate setting apart to the particular shipper a large number of cars, yet ample facilities for all other shippers may be at hand, and the requirements of all readily supplied. In such situation there could be neither discrimination nor undue advantage. The purpose of the law was not to embarrass or abolish the right of contract in respect to such matters, but to prevent an unreasonable advantage being conferred upon a particular person. If all may be supplied with cars, notwithstanding an existing contract calls for a large number to a particular shipper, no advantage accrues to that shipper, or disadvantage to others.

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The authorities cited by counsel for defendant do not, as we read them, go to the extent of holding that a contract of the tenor and effect of that here involved is void upon its face. On the contrary, the whole basis of those decisions is discrimination and undue advantage in fact. The case of Chicago & A. Ry. Co. v. Kirby, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. ed. 1033, mostly relied upon, is not in point. That case involved a discrimination in rates. The railroad company there contracted to expedite and hasten a particular shipment at regular rates, and the court held that, though such a contract would be lawful, if a rate therefor had been published as required by law, yet the contract so favoring a particular shipper at the regular tariff rate was a violation of the statute, a breach of which would not subject the company to liability. The invalidity of the contract—that is, the special advantage given the shipper—appeared upon the face of the contract. It provided for special efforts on the part of the company to transport a car of horses to a particular point in time to connect with an outgoing train on another road, at the regular rate of transportation—a benefit not conferred upon shippers in general. The case is not here in point. A special reference to the other citations is not necessary. They do not meet the question here involved.

We hold, therefore, that the contract in the case at bar is not void upon its face, and the remaining question is whether it was void in fact. This must be determined by the further question whether any undue or unreasonable advantage was thereby conferred upon plaintiff. The court below, at the request of defendant, submitted the question to the jury; counsel having first sought an instruction that the contract was void as a matter of law. In so submitting the question we discover no error. The evidence upon the question whether defendant by this contract placed itself in such position that the same privilege could not, by reason of shortage of cars or other cause, be conferred upon others similarly situated, was conflicting, presenting an issue of fact. If the company had a sufficient number of cars of this character to supply requirements of all shippers, then it is clear that no undue or unreasonable, or, in fact, any advantage at all, over other shippers, was conferred upon plaintiff. The verdict determined the issue adversely to defendant, the trial court approved the verdict,

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and we discover from the record no reason for interference. Though the evidence may perhaps be defective in some respects, the case is not one in which defendant is entitled to final judgment, and, as no new trial was asked for, the judgment must be affirmed. Cruikshank v. St. Paul F. & M. Ins. Co. 75 Minn. 266, 77 N. W. 958.

Judgment affirmed.

ARTHUR H. PATTERSON v. EDMON ADAN.[1]

November 8, 1912.

Nos. 17,866—(58).

Garnishment — liability of insurer after judgment.

Where, under a policy insuring against loss by reason of the operation of the assured's automobile, an action is brought by a person injured by such automobile against the assured, and the insurance company thereupon takes sole charge of the defense, to the exclusion of the assured, as it had the right to do under the policy, a judgment in the action against the assured becomes, as between plaintiff, defendant, and the company, a liability or debt owing unconditionally by the company to the assured, which such plaintiff may reach by garnishment.

Same — policy construed.

A provision in the policy that no action shall lie against the company, "unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after trial of the issue," applies only in case the company denies liability and refuses to defend.

After the order in the district court for Ramsey county denying a new trial of the action, defendant appealed from that order to this court but gave no supersedeas bond. Thereafter judgment was entered in the district court, and an execution was issued against him and returned unsatisfied, he having departed from the state. The Philadelphia Casualty Company, a corporation which had issued to defendant an automobile policy of indemnity against loss as defined in the policy, had defended the action but refused to pay the judg-

[1] Reported in 138 N. W. 281.

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ment. Garnishee process was then issued against it and its disclosure taken and returned to the court. Plaintiff moved for judgment, the motion was denied and the garnishee discharged, Kelly, J. From that order, plaintiff appealed to this court. Reversed and cause remanded for further proceedings.

C. D. & R. D. O'Brien, for appellant.

Harris Richardson and *Walter Richardson,* for respondent.

HOLT, J.

Plaintiff recovered a verdict against the defendant in the sum of $4,500 for an injury received through the negligence of defendant, causing his automobile, in which plaintiff was riding, to overturn. Judgment was entered on the verdict, and defendant appealed to this court, but gave no supersedeas bond. Pending the appeal, the respondent was duly garnisheed and, upon the disclosure had, plaintiff moved for judgment. The motion was denied, and the garnishee discharged.

From the disclosure it also appears that, when the accident occurred which caused the injury for which plaintiff recovered the judgment, the defendant held a so-called insurance policy issued by the garnishee, hereinafter and in the policy called the company, covering risks resulting from accidents in the use of the automobile in question. In consideration of the premium the company "agrees to indemnify the assured against loss," as therein defined, subject to the special and general agreements therein contained, which are to be construed as co-ordinate conditions. The other terms of the policy deemed material to the question now presented for decision are these:

"The company agrees to indemnify the assured:

"I. Against loss by reason of the liability imposed by law upon the assured for damages on account of bodily injuries, or death accidentally suffered by any person or persons, by reason of the maintenance, or use, within the limits of the United States of America or Canada," of the assured's automobile.

"II. Agrees to serve the assured, upon notice of such injuries or

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death, by such investigation thereof, or by such negotiations or settlement of any resulting claims as may be deemed expedient by the company."

"III. Agrees to defend, in the name and on behalf of the assured, any suits which may at any time be brought against him on account of such injuries or death, including suits alleging such injuries and demanding damages therefor, although such suits, allegations, or demands, are wholly groundless, false, or fraudulent, and covered by this policy."

"IV. Agrees to provide" the necessary appeal bonds.

"V. Agrees to pay all costs taxed against the assured in any legal proceeding defended by the company, all interest accruing after entry of judgment upon such part thereof as shall not be in excess of the limits of the company's liability as hereinafter expressed, and all expenses incurred by the company for investigation, negotiation or defense."

This insurance is subject to the following

SPECIAL AGREEMENTS:

"1. The company's liability for loss on account of an accident resulting in injuries to or in the death of one person is limited to five thousand ($5,000) dollars, and subject to the same limit for each person."

Then follow general and special provisions covering loss from destruction of the property of others through the use of the automobile, substantially of the tenor above quoted, and also general and special provisions covering loss or damage to the automobile. Then follow these general agreements relating to all the risks:

GENERAL AGREEMENTS:

"1. The assured, upon the occurrence of an accident, shall give immediate written notice thereof. * * * The assured shall, at all times, render to the company all co-operation and assistance in his power.

"2. If thereafter any suit is brought against the assured to enforce

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a claim for damages on account of an accident covered by this policy, the assured shall immediately forward to the company every summons or other process served on him, and the company will at its own cost defend against such suit, even if groundless, in the name and on behalf of the assured.

"3. The assured shall not voluntarily assume any liability or settle any claim, except at his own cost, nor incur any expense, nor interfere in any negotiations for settlement or in any legal proceedings without the consent of the company previously given in writing. * * *

"4. No action shall lie against the company to recover for any loss or expense under this policy, unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after trial of the issue."

The disclosure shows that as soon as the action was begun the company took sole charge of the defense. At the trial plaintiff recovered a verdict of $5,000, the company in behalf of defendant duly appealed to this court from an order denying a new trial, the order was reversed, and upon a new trial the verdict first above mentioned was obtained. The company carried on all the steps in the litigation, including the present appeal in the main action; but upon advice of counsel no supersedeas bond was given, because the assured defendant was then thought to be insolvent, although the company since learned that he thereafter left the state with several thousand dollars in his possession. It was also disclosed that the practice of the company, when it undertook to defend in behalf of the assured, was to pay the final judgment without waiting for the assured to pay it, first, however, ascertaining that the assured was absolutely able to respond to the full amount thereof.

Upon the record did it appear that the company, the garnishee, was indebted to the defendant when the disclosure was had? It may be conceded that the company intended so to frame the policy that not every avenue of escape from payment in case of a loss should be closed. The main purpose of its business is to obtain and retain the premiums. The object of the assured is to get protection. The ob-

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ject and purpose of the contracting parties is not to be lost sight of in construing a contract, nor is the rule that in case of ambiguity it must be resolved against the one who prepared the instrument. The language in the lengthy document before us was not the choice of the assured. Recognition needs be taken of the enormous growth of liability insurance of late years. The hazards of modern industries and the risks connected with some of the advantages of present-day life call for this kind of insurance. Policies attempting to fill this demand should, if possible, be construed so as not to be a delusion to those who have bought them. In soliciting business, is it supposable that the company would inform the assured that it assumed no risk if the assured, after accepting the policy, becomes so financially embarrassed that no judgment could be enforced against him? Insurance companies of this kind do not, at least openly, ask for the patronage of the insolvent. They profess to give the needed protection to all. Those who procure this kind of insurance have not only their own protection in mind, but also the idea that, if through their involuntary negligence a servant or other person sustains injury, such an one may be recompensed.

But, even granting that this policy is so worded that on its face it must be considered one of indemnity alone, we think that under it the company may, and in this case did, place itself in a position which has resulted in liability to the assured. If suit is brought on a claim intended to be covered by this policy, the company, after notice, agreed to defend; but, not only that, it reserved to itself the exclusive right to settle or carry on the litigation, excluding the assured from any interference therewith. On these provisions the company acted, assumed the defense, and has carried on the litigation to the bitter end, even after defendant left this jurisdiction. The assured retained no voice or interest in the litigation. The company substituted its interests and its judgment for that of the assured in the action. By so doing it assumed a relation to this plaintiff, and to every plaintiff where under its policy it steps into a suit, which must be considered in construing the contract. Neither public policy nor legal principles can be invoked against the validity of these provisions, if they mean no more than an undertaking to contest an

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asserted claim against the assured, for which it is liable when established; but if, under the pretense of an insurance obligation, the company carried on litigation in the name of one who has neither voice nor interest therein, and which does not affect the company itself, because the assured is unable or unwilling to pay if plaintiff is awarded judgment, it would seem the company becomes an officious intermeddler. Public policy does not permit a litigant to so surrender control of his lawsuit to one who has no interest in the cause of action. A contract between client and attorney, although the attorney has a lien for his fees on the cause of action, is void, if the client is excluded from control of the cause of action.

The policy here should be so interpreted, if possible, that its provisions do not run contrary to law, and that result is reached by holding that the undertaking to defend means something more than carrying on litigation in court. By undertaking the defense the company elected to treat plaintiff's cause of action, if he had any, as covered by its contract; and when it substituted itself and its judgment for that of the defendant, both plaintiff and defendant have a right to insist that the final judgment establishes the liability and debt of the company to the assured. The undertaking to defend is of no value, and may be of great danger, to the assured, where he thus abandons all control of the suit to the company, if it does not mean that whatever liability is established shall be discharged. The company admits that where the assured is perfectly solvent the practice of the company is to carry the defense to a successful issue by paying the judgment without stopping for the assured to pay it. It is even more important to an assured who is in financial stress that no judgment be allowed to stand unsatisfied against him than it is to one who has abundant means to satisfy it. Contractors and manufacturers of limited means, as well as persons of small means, or no means at all, who operate an automobile, carry the class of insurance here in question because accidents resulting in large judgments would mean financial ruin to them. Suppose after the company so insuring should insist on its right to take the exclusive charge of the defense of an action arising out of a risk covered by the policy, nevertheless a large judgment results against the

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assured, which, because of temporary embarrassment, he cannot pay; was it intended by the terms of the contract that such occurrence should relieve the company, force the assured to the wall, and leave the plaintiff in the action, whom the insurance was no doubt indirectly intended to benefit, wholly in the cold? We do not think this is a fair intention of this policy in a case where the company, under the terms thereof, substitutes itself for the assured in contesting a cause of action, and we do not so construe it.

The provision most strongly relied on by the company to show that this is indemnity and not liability insurance is this, found in the general provisions covering all the risks:

"No action shall lie against the company to recover for any loss or expense under this policy, unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after trial of the issue."

This manifestly is not a condition precedent to liability in every instance; for then, in case of loss or damage to the automobile, also covered by this policy, if the company does not voluntarily pay the loss, no action could lie. The company also expressly agrees to pay the costs taxed in the action and the interest on the judgment. Nevertheless a strict reading of the provision would make it incumbent on the assured to first pay these items expressly agreed to be paid by the company before there was a legal liability against it. We think a proper construction of the provision is that no suit will lie against the company, in cases where the company declined to take the defense, unless the assured actually litigated and paid the claim. In such a case there is no interference on the part of the company with the rights of either a plaintiff or the assured in the litigation, and, not having elected to treat the cause of action as a risk covered by the policy, it may properly stipulate that, before the assured shall maintain a suit against it, the claim must have been tried, established and paid.

We therefore hold that, in a policy such as this, where the company has come into the litigation and assumed exclusive control

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thereof under its contract, it recognizes a liability, if it fails to defend successfully, to pay the assured the amount of the judgment it so permits to be established, not exceeding the sum stipulated in the policy, and also that, as to the plaintiff, it should be considered that such judgment is a debt due the assured from the company, and not dependent on any contingency. Payment of the judgment, so far as the rights of the company are concerned, in such case, is a mere pro forma matter, and not a condition precedent to its liability to defendant under plaintiff's garnishee proceeding.

We know this conclusion is not in accord with perhaps the weight of authority; but, in the cases cited to sustain the opposite of the rule we adopt, it is not clear that the company took exclusive, or any, charge of the litigation, and therefore, in our opinion, sufficient consideration is not given to this feature of the contract. Connolly v. Bolster, 187 Mass. 266, 72 N. E. 981; Finley v. U. S. Casualty Co. 113 Tenn. 592, 83 S. W. 2, 3 An. Cas. 962; Stenbom v. Brown-Corliss Engine Co. 137 Wis. 564, 119 N. W. 308, 20 L.R.A.(N.S.) 956; Cushman v. Carbondale, 122 Iowa, 656, 98 N. W. 509; Allen v. Ætna Life Ins. Co. 145 Fed. 881, 76 C. C. A. 265, 7 L.R.A. (N.S.) 958; Maryland Casualty Co. v. Omaha Electric Light & Power Co. 157 Fed. 514, 85 C. C. A. 106; Travelers v. Moses, 63 N. J. Eq. 260, 49 Atl. 720, 92 Am. St. 663; Frye v. Bath, 97 Me. 241, 54 Atl. 395, 59 L.R.A. 444, 94 Am. St. 500.

But we are inclined to follow the rule adopted in New Hampshire, and expressed in a very able opinion by Chief Justice Parsons in Sanders v. Frankfort, 72 N. H. 485, 57 Atl. 655, 101 Am. St. Rep. 688, wherein he says: "The view that the contract means that the insurance company, after taking control of the proceedings in a suit against the assured, cannot thereafter be discharged, except by payment of the indemnity to the assured or securing his discharge from the claim, is thought to best conform to the intent of the parties, and is adopted." This seems a just and fair view, considering the terms of the contract, its purpose, and the position assumed by the parties thereunder; and we think it in line with the principles applied in Anoka Lumber Co. v. Fidelity & Casualty Co. 63 Minn. 286, 65 N. W. 353, 30 L.R.A. 689. The assumption that a similar policy

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was an indemnity and not a liability contract in Kennedy v. Fidelity & Casualty Co. 100 Minn. 1, 110 N. W. 97, 9 L.R.A.(N.S.) 478, 117 Am. St. 658, 10 An. Cas. 673, was not necessary for the determination of that case, and therefore not a precedent here.

The order is reversed, and cause remanded for further proceedings in harmony herewith.

LYDIA A. PRATT v. MINNIE QUIRK and Others.[1]

November 8, 1912.

Nos. 17,979—(56).

Ejectment — evidence.

Action to recover possession of a strip of land over which a public highway originally ran. The plaintiff, or those through whom she claims, conveyed by several deeds all of the land abutting on the highway before it was vacated, and after it was vacated this action was brought. The trial court found that the plaintiff had not proven the allegations of her complaint as to her ownership of the land. Evidence, including the deeds, construed, and *held*, that it sustains the finding. The trial court did not err in excluding evidence as to the subsequent acts of the parties to the deeds.

Action in the district court for Hennepin county to recover possession of certain premises and $300 for unlawful detention thereof. The separate answer of defendants Quirk alleged ownership of the premises in defendant Minnie Quirk long prior to November 13, 1908, excepting a portion therein described; that the ownership was acquired through direct and mesne conveyances from plaintiff and her former husband; that the conveyances were made and delivered for a lawful consideration duly paid, and were made long prior to the vacation of the road, which was made by the city council of Minneapolis; that such ownership in Minnie Quirk was subject only to public easement in that part of the premises which was included

[1] Reported in 138 N. W. 38.

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in the ways, streets and alleys dedicated to public use by a certain plat. The separate answer of defendants Engdahl was in substance a general denial. The case was tried before Holt, J., who made findings and as conclusion of law ordered judgment in favor of defendants. From an order denying her motion for a new trial, plaintiff appealed. Affirmed.

Lane & Malmberg, for appellant.

Charles J. Williams and *J. H. Green,* for respondents.

START, C. J.

Appeal from an order of the district court of the county of Hennepin denying the plaintiff's motion for a new trial in an action of ejectment for the recovery of land originally embraced within the boundaries of a public highway, 66 feet wide, and known as the Wayzata county road. The cause was tried by the court without a jury. The evidence was sufficient to establish the evidentiary facts following:

Lot 1 in Auditor's subdivision No. 46, of the county of Hennepin, was, on and previous to 1902, owned by plaintiff's husband, since deceased, Rufus L. Pratt. The highway ran from a point one hundred feet westerly from the southeast corner northwesterly across the lot. On April 21, 1902, Rufus L. Pratt, by warranty deed, his wife, the plaintiff, joining therein, conveyed a part of lot 1 to the defendant John F. Quirk, which was described as follows:

"That part lying south of county road of lot one (1) in Auditor's subdivision No. 46, Hennepin county, Minn., according to the record plat thereof on file and of record in the office of the register of deeds in the county of Hennepin and state of Minnesota."

The tract of land so conveyed to John F. Quirk was, on July 13, 1904, duly conveyed to his wife, the defendant Minnie Quirk.

On June 13, 1903, Rufus L. Pratt, by warranty deed, his wife, the plaintiff, joining therein, conveyed a part of lot 1 to John S. Calder. The part or tract so conveyed was described in metes and bounds, and the call in the description relating to the southerly

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boundary of the tract conveyed was, so far as here material, in these words:

"Thence south at right angles to the northerly line of the Wayzata county road * * * thence southeasterly along said county road."

The tract of land so conveyed to John S. Calder was, on May 20, 1907, conveyed by him to the defendant herein, John Engdahl.

On February 8, 1905, Rufus L. Pratt died intestate. His estate was duly probated, and a decree of distribution made, assigning to his heirs, with other land not here in question, a tract of land described as follows:

"Commencing at a point on the west boundary line of lot one (1), Auditor's subdivision No. 46, three hundred thirty-four and 95/100 feet south of the northwest corner of said lot one (1); thence east at right angles to a point one hundred and thirty-five feet west of the east line of said lot one (1); thence south at right angles to county road; thence northwesterly along north line of county road to west boundary line of said lot one (1); thence north to point of beginning."

On December 20, 1906, the heirs, other than the plaintiff, Lydia A. Pratt, conveyed to her this last described tract, by the identical description and boundaries contained in the decree of distribution; then followed these words: "Meaning to convey the residue of lot one (1) not conveyed by Rufus L. Pratt during his lifetime." The plaintiff on March 14, 1907, conveyed this tract to William E. Stevens by deed containing the same description and boundaries as those in the deed from the heirs to her. Thereafter William E. Stevens conveyed the same tract to Minnie Quirk, one of the defendants herein. The highway in question was duly vacated in November, 1908.

The trial court, upon a consideration of the evidence, found as a fact that the allegations of the complaint as to the land therein described by the plaintiff had not been proven, and as a conclusion of law therefrom that plaintiff take nothing by her action.

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It is the contention of the appellant that the finding and decision of the trial court are not sustained by the evidence and are contrary to law. This involves the question of the construction of the several deeds herein referred to, and whether the court erred in excluding oral evidence of the alleged intention to the parties to the deeds.

The general rule applicable to the question is this: If a deed bounds the land upon a street or highway, title passes to the center thereof, subject to the public easement, if there be nothing in the deed, or the location of the land, or the relation of the parties showing a different intention; but where a deed expressly makes the nearer external line of the highway or street the boundary line of the tract conveyed, and no other language is used indicating a contrary intention, no title to the street passes to the grantee. So construing the description in the deed from Pratt and wife to Quirk, it is clear that the deed conveyed the fee to the southerly half of the highway subject to the public easement, for the tract conveyed was the part of the lot lying south of the highway. The part so conveyed abutted on the highway, which was necessarily the northerly boundary thereof. In like manner the deed from Pratt and wife to Calder, through which the defendant Engdahl claims, bounds the tract conveyed by the highway, and the deed conveyed the fee to the center of the highway upon which the tract conveyed abutted. It is true that the line runs to the northerly line of the highway; but the highway, and not its northerly line, is expressly made the boundary of the land conveyed. See Kneeland v. Van Valkenburgh, 46 Wis. 434, 1 N. W. 63, 32 Am. Rep. 719.

This leaves for consideration only the northerly half of so much of the highway, upon which the tract, conveyed by the plaintiff to Stevens and by him to defendant Minnie Quirk, abutted. The record shows that the plaintiff on the trial attempted to show her title thereto by introducing in evidence the decree of distribution, the deed of the heirs to her, and the deed to Stevens. It may be conceded, for the purposes of this appeal, that none of the deeds conveyed the fee of the land to the center of the highway upon which the tract abutted; but if the fee to the center of the highway was excluded from the

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boundaries described in the deeds, so also was it from the decree of distribution, for the boundaries were identical in all of the instruments.

The plaintiff, to avoid this conclusion, relies upon the words in the deed from the heirs to her, "meaning to convey the residue of lot one (1) not conveyed by Rufus L. Pratt during his lifetime." These words cannot be fairly construed as conveying any land in addition to that described in the deed, which does not purport by its terms to convey any other land except that therein described. The added words were evidently inserted for the purpose only of identifying the premises conveyed, if perchance there was any uncertainty in any of the calls in the description of the land.

The case of Sanders v. Townshend, 89 N. Y. 623, cited by plaintiff, is not here in point, for the reason that the deed in that case conveyed by number a large number of lots in Harlem commons, and "also all other lands contained within the limits of said commons * * * not heretofore conveyed by the parties" of the first part. It was correctly held that two such lots not designated by numbers were conveyed by the deed.

We hold that the findings and decision of the trial court are sustained by the evidence, and are not contrary to law.

The plaintiff further urges that the trial court erred in excluding evidence of the subsequent acts and conduct of the parties to the deed, for the reason that the deeds were ambiguous. An examination of the record satisfies us that the trial court did not err in excluding the evidence.

Order affirmed.

HOLT, J., having tried the case below, took no part.

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STATE v. EDWARD J. McGRATH.[1]

November 11, 1912.

Nos. 17,997—(270).

Criminal law — self-defense — burden of proof.

In cases of homicide or assault, no burden rests upon defendant to prove that his act was justifiable, because in self-defense; but the jury, to convict, must be satisfied beyond a reasonable doubt that the act was not justifiable on such ground. In this case, *held* error to refuse defendant's request for an instruction to that effect; the matter not being so specifically covered in the general charge as to make it reasonably certain that the jury was not misled.

Defendant was indicted by the grand jury of Aitkin county of the crime of assault in the first degree and pleaded not guilty. He was tried in the district court before McClenahan, J., and a jury which returned a verdict of guilty of assault in the second degree, and was sentenced to hard labor in the state prison. From the judgment rendered and from an order denying his motion for a new trial, defendant appealed. Judgment of conviction reversed and new trial granted.

J. G. Hessian, for appellant.

Lyndon A. Smith, Attorney General, and *Louis Hallum,* County Attorney, for respondent.

BUNN, J.

Defendant was tried in the district court for Aitkin county on an indictment alleging assault in the first degree. He was convicted of assault in the second degree. A motion for a new trial was made and denied, and defendant sentenced to the state prison. He appealed to this court from the judgment, and also from the order denying a new trial.

[1] Reported in 138 N. W. 310.

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The sole question involved is whether it was error to refuse to give the jury the following instruction, requested by defendant:

"No burden of proof rests upon the defendant to prove that he acted in self-defense. The burden of proof is upon the prosecution to satisfy or convince you beyond a reasonable doubt that the act of defendant was not self-defense."

The bill of exceptions does not contain the evidence, but it states that "on said trial there was evidence received tending to prove the charge alleged in the indictment; and there was evidence received tending to prove defendant's defense of self-defense, and sufficient to entitle the same to be considered by the jury on the question of defendant's defense of self-defense." The charge of the trial court shows that the shooting which was alleged in the indictment was admitted by defendant, and that the sole issue for the jury was whether the defendant was justified. The request refused accurately stated the law, and unless it is clear that the charge as given gave the rule so that the jury could not be misled, it was error to refuse the request. State v. McPherson, 114 Minn. 498, 131 N. W. 645.

It is a more or less general impression that when a defendant, accused of crime, admits the act, but relies on self-defense, accident, or an alibi, the burden is upon him to establish his defense. Notwithstanding that it is pretty well understood in a general way that a defendant, accused of crime, is protected by the presumption of innocence until his guilt is established beyond a reasonable doubt, yet we find intelligent men speaking of the duty of a defendant to prove his innocence, and especially in cases where the act is admitted, and the question is whether it was done with guilty intent, where intent is an element, or whether it was justifiable or excusable, in cases of assault and homicide. Probably every lawyer, and certainly every judge, understands that the state must prove, not only the act, but the intent with which it was done, and, in a prosecution for assault or murder, that the act was not done in self-defense. But jurors are not lawyers and judges, and, in the absence of clear, explicit instructions from the court, may often be impressed with the idea that a defendant, who tries to justify or excuse

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his act, must make out his defense by a preponderance of the evidence.

In the case at bar, the court in its charge speaks of "the position" of defendant being that the shooting was justifiable, and of "the defense of self-defense—justification." The language tends to convey a wrong impression, unless carefully explained. There is nothing in the entire charge, except the language which is below quoted, which in any way tended to remove the quite natural impression which the jury might have that the defendant was obliged to show that he acted in self-defense. In the case of the defenses of insanity, or intoxication, the burden is upon defendant, by virtue of our statute; and the uneducated mind does not easily distinguish in this regard between such defenses and those of self-defense, accident, or an alibi.

It remains to consider whether the refused request was in substance given in the general charge, in language that the jury could not misunderstand, and which would make clear to their minds that the jury, to convict, must be satisfied beyond a reasonable doubt that defendant did not act in self-defense. After fully, clearly, and fairly stating the law on the subject of when an assault is and is not justified, the trial court said:

"The defendant in a criminal case is entitled to an acquittal, unless the trial jury is satisfied beyond all reasonable doubt that he is guilty. In other words, the burden is upon the state to establish the guilt of this defendant beyond all reasonable doubt. * * * The jury must be satisfied beyond all reasonable doubt of the guilt of this defendant, and in this case that means that the shooting was without justification, and, if your verdict be of assault in the first degree, was with intent to kill and without justification; if of assault in the second degree, it was without justification and without an intent to kill."

In legal effect the language of the charge has the same meaning as the language of the refused request. The court told the jury that the state must prove beyond a reasonable doubt that the shooting was

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without justification; it refused to tell them, as requested, that no burden of proof rested on the defendant to prove that he acted in self-defense, or that the burden of proof was upon the state to satisfy the jury beyond a reasonable doubt that defendant did not act in self-defense. While a legal mind might understand, from the instruction given, that no burden rested on defendant, and that he was entitled to an acquittal unless the evidence satisfied the jury beyond a reasonable doubt that he did not act in self-defense, the correctness of an instruction is to be governed by a consideration of how a jury might understand the language, not how it is understood by judges and lawyers. The words of Justice Brown in Mailand v. Mailand, 83 Minn. 453, 86 N. W. 445, are in point:

"Instructions of a trial court should be viewed by an appellate court, so far as possible, from the stand-point of the jury. It will not do to construe them in the light of strict, abstract legal principles. The real question, in all cases where exception is taken to the charge, is: What might the jury have understood from the language of the court? * * * An instruction may be analyzed, and made clear and consistent with the rules of law applicable to the case, and at the same time, when viewed from a practical, common-sense stand-point, appear clearly misleading and prejudicial to the party excepting."

This language was used in a civil case, and where there was not a request to instruct in language that could not be misleading. It is the more applicable in a case where the liberty of defendant is at stake, and where such a request has been duly made, refused, and the refusal excepted to. We think that, when viewed from the stand-point of the jury, it cannot be said that the instruction given might not be misleading, to the prejudice of defendant. The instruction refused was one which could not have been misunderstood. To say that the state must prove that the shooting was without justification is certainly not as plain and as easily understood a statement of the law as saying that no burden of proof rests on the defendant to show that he acted in self-defense, and that the jury must be satisfied beyond a reasonable doubt that he did not act in self-defense. It was

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not so well calculated to remove from the minds of the jurymen the natural assumption that self-defense was a defense to be proved by the party making it. Trial courts should exercise care to make the jury understand clearly that each element of a crime must be proved beyond a reasonable doubt to justify conviction—should realize that the men who compose our juries are not versed in legal terms, and often quite unable to grasp the real meaning of instructions given, unless couched in the plainest and most emphatic words.

Our conclusion is that it was prejudicial error to refuse the instruction requested by defendant.

The judgment of conviction is reversed, and a new trial granted.

CARRIE STROMBERG v. LOUIS C. STROMBERG.[1]

November 15, 1912.

Nos. 17,634—(46).

Widow's allowance.

Under section 3653, R. L. 1905, the allowance to the widow of the personal wearing apparel and a limited amount of the household goods from the husband's estate, is confined to the articles specified, and she has no right to select money or other property in lieu thereof.

Same — when decedent was nonresident.

The widow of a nonresident decedent is entitled to the statutory allowance out of the property of her husband found in this state where it appears that her husband left no other property whatever.

The probate court for Goodhue county discharged and denied the petition of Carrie Stromberg for an order directing Louis C. Stromberg, as administrator of the estate of her deceased husband, to turn over to her such sums as she was entitled to under law as widow of deceased. From that order, petitioner appealed to the district court for that county, where the appeal was tried before Johnson, J., who

[1] Reported in 138 N. W. 428.

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made findings and as conclusion of law found that petitioner was not entitled to any relief and dismissed the petition. From the judgment entered pursuant to the findings and order for judgment, Carrie Stromberg appealed. Reversed and remanded.

George Frantzen, Charles J. Tryon and *Lew C. Church,* for appellant.

F. M. Wilson, for respondent.

HOLT, J.

Peter J. Stromberg died in Chicago, Illinois, while a resident therein, leaving him surviving his widow, the appellant, but no issue. He left no estate whatever in the state of his domicil, either in the way of household furniture or other personal property, except that he carried $2,000 life insurance payable to his estate. His brother was appointed administrator of the estate by the probate court of Goodhue county, Minnesota. He, having possession of the insurance policy, collected the full amount thereof. Resident creditors of the deceased presented claims against the estate which were duly allowed by said probate court, aggregating more than $2,000. Appellant, as widow, presented her petition for the statutory allowance of the equivalent for household goods in money, and also for the sum of $500 out of other personal property. Her petition was denied in toto by the probate court and also by the district court on appeal. She appeals to this court from the judgment entered on the findings and order of the district court.

We are clear that the trial court was right in holding that, where a decedent left no household goods, the widow is not entitled to have any allowance in lieu thereof. If there be household goods, she is entitled to select and keep such to the value of $500, but the statute, section 3653, R. L. 1905, does not allow her to select an equivalent in other property. Her right to the selection of certain specified articles of her deceased husband's property is clearly confined to those articles, the household goods, not to exceed a fixed value. In regard to the additional allowance of $500, it is equally clear that she may select money or any other form of personal property of her deceased husband.

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Therefore the only doubtful question in the case relates to the court's ruling that a widow of a nonresident decedent is not entitled to claim the statutory allowance from his estate, the whole thereof being in this state. It is true that, for the purposes of distribution of the estate of a nonresident decedent, all his personal property is regarded as being situate at the place of his domicil, subject to the right of his creditors in the state where the property is actually found to lay hold thereof through ancillary administration in the probate court to the extent of satisfying their claims. And the respondent confidently asserts that under section 3687, R. L. 1905, the whole estate of a nonresident decedent, as far as it may be laid hold of here, is subservient to the rights of the creditors here residing. But this section must be construed in connection with section 3653 above cited, and also sections 3714 and 3715 of the Code. By the last two sections it is provided that, after the inventory has been filed and before any claims are presented or allowed, the surviving spouse may petition the court to set aside the homestead and assign to her the personal property allowed by law. Thereupon the court shall make an order setting aside such homestead and assigning such property to her. The last part of section 3715 reads:

"The property so set aside shall be delivered by the executor or administrator to the person entitled thereto, and shall not be treated as assets in his hands."

The part the widow is entitled to is not to be included in the estate to be administered upon, and is not subject to the expenses of administration or the payment of proved claims, and is no part of the residue to be distributed. All that the probate court is called upon to do with relation to such property is to segregate it from the rest of the estate and order the executor or administrator to deliver it to the widow. Section 3653, supra, reads: "When any person dies owning personal property or any interest therein, the same shall be disposed of and distributed as follows." Then comes first the allowance to the widow; secondly, the funeral expenses and expenses of administration, and thirdly, the distribution of the residue. The

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statute is not limited to residents, either as to the decedent or the surviving spouse. The instant case is not one of ancillary administration, strictly speaking, for it appears from the findings "that said life insurance policy was all the property or estate of any kind owned by said Peter J. Stromberg at the time of his death, and that said life insurance policy constituted his entire estate." There can therefore be no other place or opportunity for this widow than here, in this proceeding, to claim her allowance. A humane and beneficent purpose to make some provision immediately available to one bereft of support is manifest in this statute, and we think the widow of a nonresident ought not to be deprived of this benefit provided by our law, where it clearly appears that the only property belonging to the estate of her deceased husband is here.

Justice Mitchell, in the concurring opinion in Benjamin v. Laroche, 39 Minn. 334, 40 N. W. 156, in apt and terse language, expresses the true status of the personal property which the surviving spouse takes under our law: "I concur, but would place the decision upon the ground that the right of a widow to the property allowed her by subdivision 1, § 1, chapter 51 [R. L. 1905, § 3653] is as absolutely vested the instant of the death of her husband as that to her distributive share of the balance of the estate, the only difference being that in the one case the property is subject to administration, and in the other not."

That this is now the law appears clearly from the opinion in Simmons v. Higbie's Estate, 103 Minn. 448, 115 N. W. 265, where Mr. Justice Brown says with reference to a widow's right under this statute: "The clear intention of the legislature was to vest an absolute right to the property mentioned in the widow; the only act remaining to be done after the husband's death being the designation of the particular property selected by her. * * * It was clearly not the intention that the property so 'allowed' should enter into the administration of the estate at all."

The fiction of law that the situs of the personal property of a nonresident decedent is in the state or country of his domicil is only for the purpose of distributing the residue of the estate, subject to the expenses of administration and the rights of creditors, in the state

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where the property is actually found. Property not subject to administration or distribution need have no situs by fiction of law to come into the possession of the true owner. No legislative intent to restrict the scope of the beneficiaries named in the first subdivision of said section 3653 to resident widows or widows of nonresident decedents is found in the language itself. It is all comprehensive. In view of the fact that enactments of similar import to said section are found so generally upon the statutes of sister states, it would seem that by comity we should extend to a widow who comes into the state where the only property of her deceased husband is found, the same right she would have had if both she and her deceased husband were domiciled here. In the case note to Jones v. Layne (N. C.) 11 L.R.A.(N.S.) 361, it is said:

"A state within whose borders personal assets of a decedent are found has the power to grant an exemption or allowance to the widow out of those assets, irrespective of the domicil of her husband at the time of his death. * * * Generally, however, the local statutes on the subject are not explicit with respect to the effect of the residence or domicil of the deceased in another state at the time of his death; and in such situation the well-established principle of private international law, that the distribution of the personal estate of a decedent is governed by the law of his domicil is allowed to control."

Even when such statutes are not explicit a restricted construction has not been given. Jones v. Layne, supra, and In re Estate of Gill, 79 Iowa, 296. In Kapp v. Public Adm. 2 Brad. (N. Y.) 258, upon facts similar to those here involved and under a statute much like our own, the rights of the widow to certain personal property of her deceased husband were not limited by the fact of decedent's domicil in another state.

The judgment must therefore be reversed and the case remanded with direction to the court below to modify the conclusion of law so that judgment conforming to the views herein expressed may be entered.

Reversed and remanded.

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ALVRO C. WORDEN v. CHARLES BIELENBERG.[1]

November 15, 1912.

Nos. 17,647—(34).

Real property — permanent injury — temporary injury.

A permanent injury to real property, as distinguished from a temporary or continuing injury, is one of such a character, and existing under such circumstances, that it will be presumed to continue indefinitely. A temporary or continuing injury is one that may be abated or discontinued at any time.

Trespass — measure of damages.

The trespass complained of in this action, the excavation in the street adjacent to plaintiff's property, to a depth substantially on the grade established by the city, *held* a permanent and not a continuing injury, and that the measure of plaintiff's damages is the diminution in the market value of his property.

Action in the district court for Ramsey county to recover $650 damages for obstructing a street and cutting off access to plaintiff's house. The facts are stated in the opinion. The answer alleged that Robie street extended in an easterly and westerly direction and crossed Gorman and Livingston avenues; that Robie street and Livingston avenue were covered by a thick bed of limestone and that for some years defendant had been engaged in quarrying the limestone from the properties owned by him; that pursuant to the authority granted by the common council to grade Livingston avenue at his own expense, defendant quarried stone from and graded Livingston avenue to the established grade; that the grade of Robie street between Gorman and Livingston avenues had never been established; that he had taken out most of the rock from that part of Robie street lying between plaintiff's property and Livingston avenue, and that no part of Robie street lying between plaintiff's property and Livingston avenues had been graded or excavated below what necessarily

[1] Reported in 138 N. W. 314.

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must be the established grade of Robie street. The reply was a general denial. The case was tried before Hallam, J., and a jury which returned a verdict in favor of plaintiff for $450. From an order granting defendant's motion for a new trial, plaintiff appealed. Affirmed.

R. G. O'Malley, for appellant.

O. E. Holman, for respondent.

BROWN, J.

Plaintiff owns a lot in the center of block 87, West St. Paul, which he occupies with his family as a residence. The lot fronts on Robie street. Defendant owns all the lots in this block to the east of plaintiff's lot and up to the line of Livingston avenue, and also all the lots west of plaintiff's property; all fronting on Robie street. All the property, including the adjacent streets, is underlaid with a deposit of limestone, of marketable value. In 1885 the city council by appropriate proceedings established the grade of Livingston avenue at two feet below the natural level of the ground; and in 1905 the grade of Gorman avenue, to the west of the block, at about twenty feet below the natural level of the ground. The grade of Robie street, fronting plaintiff's property, and extending between Livingston avenue and Gorman avenue, has never been officially established or changed from the natural level. Defendant, under what he claims constituted lawful authority from the city council, the validity of which is not now material, excavated Livingston avenue and removed therefrom all the limestone to a depth of about eighteen feet. This was sixteen feet below the established grade. He also removed the stone from his own land to the same depth, up to the line of plaintiff's property. Thereafter the city council re-established the grade of that street to correspond substantially with defendant's excavation. Defendant also removed the stone from Robie street up to the line of plaintiff's lot. He presented on the trial no authority for this action, from the city council or otherwise, and his conduct was therefore wrongful and unlawful. By reason of the excavations so made by defendant, and by others upon the other side of the block, plain-

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tiff's access to his property has been interfered with, and the natural conditions wholly destroyed.

Plaintiff brought this action for damages, alleging the wrongfulness and unlawfulness of the acts of defendant. At the trial below it was contended that the injury and wrong complained of was continuing, and that the plaintiff was entitled to the diminished rental value of his property as damages for the wrong. The court sustained this view of the case, and received evidence and charged the jury accordingly. Defendant duly excepted. Plaintiff had a verdict. Defendant moved for a new trial, assigning as error that an incorrect rule of damages was applied; it being contended that the injury and damage to plaintiff was permanent, and that the difference in value before and after was the proper rule of damages. The trial court sustained defendant, and held that the rulings upon the trial were erroneous, and granted a new trial. Plaintiff appealed.

The only question presented is whether the trespass complained of is permanent or continuing. The result of our examination of the subject and of the authorities is that the injury is permanent, entitling plaintiff to recover in one action all damages suffered in consequence of the wrong. A permanent injury to real property, as distinguished from a temporary or continuing injury, is one of such a character and existing under such circumstances that it will be presumed to continue indefinitely. A temporary, or continuing injury is one that may be abated or discontinued at any time, either by the act of the wrongdoer, or by the injured party.

The injury here complained of is the act of defendant in making the excavations in the street; not in acts committed from day to day in doing the work, but the wrong resulting from the completed act. One of the streets excavated was left practically upon the grade as established by the city. This is permanent, at least presumably permanent, from the facts disclosed. It is not at all probable that the grade of the street will ever be restored to the natural level of the land, and neither defendant nor plaintiff could lawfully go thereon and restore the same to its former condition. The contention of plaintiff that defendant could be compelled to do this is clearly not sound. The authority conferred upon the municipality over the

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streets thereof is supreme, and any wrongful interference therewith by third persons constitutes a trespass or a nuisance, as the case may be, of which, as a general rule, only the public can complain. No suit could be maintained to compel defendant to restore this street to its natural condition, unless the city was made a party, in which event it is manifest that the city would interpose in defense its authority over the street, and successfully contest the relief sought on the ground that the street was at an established grade and ought not to be disturbed. While no grade has ever been established for Robie street, it seems certain that that thoroughfare will be made to correspond to the connecting street grades established for Livingston avenue and Gorman avenue. In this situation, and with no present or remote prospect that either of the streets will ever be restored to their former level, the injury complained of must be held permanent. The facts bring the case within the rule laid down in Baldwin v. Chicago, M. & St. P. Ry. Co. 35 Minn. 354, 29 N. W. 5.

Counsel called in question the soundness of that decision, but we discover no sufficient reason for departing from it. It seems in harmony with the general principles of the law on the subject, and we follow and apply it. See, also, Ziebarth v. Nye, 42 Minn. 541, 44 N. W. 1027. In the case of Harrington v. St. Paul & S. C. Ry. Co. 17 Minn. 188 (215) cited by plaintiff, the wrong complained of was the continuous operation of trains, and not the act of defendant in constructing its road in the street. The injury involved in Aldrich v. Wetmore, 56 Minn. 20, 57 N. W. 221, and Jungblum v. Minneapolis, N. W. & S. W. R. Co. 70 Minn. 160, 72 N. W. 971, was continuing in character, and one that could be abated and discontinued at any time. Those cases are not in point.

Our conclusion, therefore, is that the injury here shown is of a permanent character, and the measure of plaintiff's damages is the diminution in the market value of his property.

Order affirmed.

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JAMES EVERINGTON and Others v. BOARD OF PARK COMMISSIONERS OF CITY OF MINNEAPOLIS.[1]

November 15, 1912.

Nos. 17,680—(41).

Assessment for local improvement — due process of law — notice of hearing.

In proceedings to assess the cost of lands acquired for park purposes in Minneapolis, it is *held:*

1. The owners of land to be assessed were at some stage of the proceedings entitled to a hearing *de novo* upon all objections they might have, in order to constitute due process of law.

2. The trial in the district court on the application to confirm the assessment of the park assessors is not such a hearing.

3. The order or judgment confirming such assessment is a final order or judgment, and precludes the objectors from having such a hearing thereafter.

4. The hearing provided by the laws to be held before the park assessors is such a hearing. Notice of the time and place thereof, served by publication describing the location of the proposed park, but not describing the property to be assessed therefor, or the boundaries of the assessment district, is a sufficient notice to constitute due process of law.

5. The decision of the trial court to the effect that the assessors did not act on illegal or erroneous principles in assessing the property of objectors as specially benefited by the park, is sustained by the evidence.

6. It was not prejudicial error to try the case on affidavits, with permission to objectors to apply to be permitted to offer oral testimony in addition.

In proceedings under Sp. Laws 1889, p. 567, c. 30, § 4, to assess the special benefit from the purchase of certain lands in the city of Minneapolis for park purposes, the park assessors filed their report in the district court for Hennepin county and application was made to the court for the confirmation of the same. James Everington, and other landowners whose property was assessed, objected to the

[1] Reported in 138 N. W. 426.

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confirmation of the assessment. The proceedings in the district court are narrated in the opinion and were before Waite, J., who confirmed the assessment. From the order overruling the objections and confirming the report of the assessors and from a subsequent order denying objectors' motion to make findings of fact and conclusions of law, and to vacate the prior order and grant a new trial, they appealed. Affirmed.

George H. Selover, for appellants.

C. J. Rockwood, for respondents.

BUNN, J.

Proceedings under section 4, chapter 30, page 567, Sp. Laws 1889, to assess the cost of lands acquired for park purposes in Minneapolis upon lands specially benefited thereby. Objections were filed and the matter heard before the district court for Hennepin county on the application to confirm the assessment. The trial court granted the application. Objectors appealed from the order confirming the assessment, and also from a subsequent order denying the motion of objectors to vacate the prior order and grant a new trial.

The first question is whether either order is appealable. We hold that the second order should be construed as one denying a new trial and that it is appealable.

The case on the merits presents serious and difficult questions, to the proper understanding and decision of which a rather full statement of facts is necessary.

The land acquired for park purposes was a tract in the sixth and eleventh wards of Minneapolis, bounded on the north-east by the Mississippi river. The board of park commissioners determined that seventy per cent of the amount required for the purchase of this tract, which was $49,400, should be assessed upon and collected from the land specially benefited by the establishment of the park. The board then petitioned the district court for the appointment of park assessors. Notice of this application was published as required by the law. No appearance was made in opposition to the petition, and the court appointed three assessors to determine the assessment dis-

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trict and make the assessment. The assessors so appointed qualified, made and caused to be published notice of the time and place when they would meet for the purpose of making such assessment, and that "all parties interested may appear before said assessors and be heard touching any matter connected with the assessment." This notice was not personally served upon any of the interested property owners, and did not contain any description of the assessment district, its location or extent, but did contain a description of the property taken for the park. It does not appear that appellants or any interested persons appeared before the assessors at their meeting. The assessors fixed the boundaries of the assessment district, made the assessment and filed their report to the district court. This report described the limits of the assessment district, named the amount assessed against each lot or parcel of land included in the district, and the owner thereof. Notice of the application to confirm the assessment was given as required by the law. In fact it is conceded that each step in the proceedings, up to this time, was strictly in accordance with the provisions of the statute under which the assessment was made. The objectors appeared and opposed the confirmation; the objections filed by them, as far as they are material here, may be summarized thus:

The assessment of any property on the east side of the Mississippi for the acquisition of a park on the west side of the river is "unjust, and unfair and inequitable." No special benefits have accrued or will accrue to said property that would not have accrued to the whole city. In brief, the objections fairly raised the question whether the assessors proceeded upon "erroneous principles" in assessing any property on the east side of the river.

The order recites that, after granting leave to the several objectors to file their objections (the time fixed by law having expired) "Mr. Selover applied for leave to introduce oral testimony in support of the objections, which application the court denied, (the objectors duly excepting) and directed that the hearing be upon affidavits, with leave to the objectors, however, to orally cross-examine the assessors, and to make further application for leave to orally examine other witnesses if this should be deemed necessary after the submission of

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affidavits." The court then ordered that objectors serve their affidavits upon the attorney for petitioner on or before September 25, 1911, and that further hearing be had on the objections September 26, upon such affidavits and such further affidavits as petitioners might then desire to submit. The matter was heard on the date fixed upon these affidavits, no oral evidence being taken. It is not shown that objectors applied again for permission to "orally examine other witnesses."

1. The question of greatest importance and difficulty is as to whether the park assessment procedure provided by the law, as followed in this case, constituted due process of law. It cannot be doubted that at some stage of the proceedings the objectors were entitled to a hearing *de novo,* upon due notice.

2. We think it reasonably clear that the trial below was not such a hearing. In fact it could not be, if the terms of the law were observed. The objectors could not question the amount of the assessment, unless fraud, mistake, or erroneous principles were shown. The report of the assessors had a prima facie value that entirely prevented a trial *de novo* on the application to confirm the assessment. The court was acting really as a court of appeal, the report of the assessors having much the effect of the verdict of a jury or the decision of a trial judge. State v. District Court of Hennepin County, 33 Minn. 235, 22 N. W. 625.

3. It is urged that the objectors still have this opportunity to be heard in the tax proceedings which must follow before judgment can be entered against their land for the assessment. But we cannot concur in this. The order confirming the assessment is a final order or judgment, and concludes all parties as to all questions concerning the amount of the assessment, whether the property received a special benefit, and mistakes made or illegal principles adopted by the assessors. State v. District Court of Hennepin County, supra.

4. We therefore think that whether there was due process of law depends upon whether the owners of property affected by the assessment had an opportunity, after due notice, to be heard before the assessors. The law gives this right to a hearing, and the only ques-

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tion here is as to whether "due notice" to the property owners whose lands were to be affected is given by a published notice that is not directed to anyone, does not describe any property except that taken for park purposes, and in no other way indicates upon what property or district the assessment may be spread.

That the notice was not personally served is immaterial. Constructive service by publication was sufficient. Neither is it important, we think, that the notice was not directed to property owners by name. It may fairly be construed as being directed to all "interested parties." The difficulty is that it does not describe the property to be assessed, or indicate its location, save by the description of the proposed park. The notice does say that the lots to be assessed are in the city of Minneapolis, and are such as the assessors "shall deem to be specially benefited by the park" described in the notice. It is perhaps a fair inference that the property to be assessed lies in the vicinity of the proposed park—not so far away that it cannot receive a special benefit, as distinguished from a general benefit. There is one case holding such a notice insufficient. Boorman v. City, 65 Cal. 313. But we are not prepared to agree with the conclusion reached in the California case. The notice given by the assessors was to give interested property owners an opportunity to be heard on the question of the extent and boundaries of the assessment district, as well as on the question of the amount their respective lots should bear. It was of course impossible to describe the district before it had been determined. Had the district been fixed, a notice sufficient to apprise parties interested that their property is included within the district would have been good, though it was not directed to any particular persons and though it did not describe any particular property. The only vice then, in the notice given, was the failure to notify property owners that their property was liable to be assessed for the park. But it may fairly be said, we think, that the notice given was sufficient to apprise each owner of property in Minneapolis that land had been purchased for a public park, and that an assessment was to be levied upon the property specially benefited thereby. Owners of property near the park might well realize that prudence required them to appear before the assessors with their

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evidence and arguments against the proposed assessment. We regard the question as doubtful, but conclude that the notice was sufficient. This conclusion seems to be in accord with that reached by the Wisconsin supreme court in Hennessy v. Douglas County, 99 Wis. 129. It is not easy to see much difference between a published notice that defines the boundaries of the proposed assessment district, and one which merely describes the location of the public improvement for which the assessment is made.

There is no fixed rule as to what kind of a notice is necessary in order to make due process of law. It is not correct to say there must be the same degree of certainty in a description as is required in a deed. An assessment for a local improvement is a public matter, a species of tax, and the due process clause of the Constitution is satisfied easier in such cases. The Minneapolis park law has been in force many years, and many assessments have been made under it. This fact, while not controlling, is not without weight in the solution of a question so doubtful. In State v. District Court of Hennepin County, supra, the point was made that the notice did not designate the property to be assessed, nor the district within which assessments would be made. The court decided that this did not invalidate the assessment, though the constitutionality of the law providing for such a notice was not expressly declared. A reference to the briefs of counsel in that case discloses that the point was made and elaborately argued, and had it been upheld, the decision must have been otherwise.

4. We are unable to hold that the decision of the trial court to the effect that the assessors did not proceed upon an alleged or erroneous principle in assessing property on the opposite side of the river from the proposed park, is not sustained by the evidence. We do not feel justified in saying that, as a matter of law, there can be no special benefit to such property.

5. The action of the trial court in trying the proceeding on affidavits, is claimed as error. It does not appear that objectors renewed their application to be allowed to offer oral evidence, or that they

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were prejudiced by this method of trying the case. We do not feel warranted in granting a new trial on this ground.

Order affirmed.

BROWN, J. (dissenting):

I am unable to concur in the view that in assessing property upon the opposite side of the river the assessors did not proceed upon an erroneous principle. It seems demonstrable to me, as a matter of law, that property so far removed from the proposed improvement should not be included in the assessment district.

WILLIAM G. WHITE v. JAMES BYRD HEWITT and Others.[1]

November 15, 1912.

Nos. 17,682—(31).

Res judicata — estoppel of plaintiff's grantor.

In this action of partition, the issue was as to whether or not plaintiff had any title to an undivided one-third interest in the land. It is *held:*

1. That a judgment in a former action between plaintiff's grantor and others, as plaintiffs, and certain of the defendants in this case as defendants, estopped plaintiff's grantor and those in privity with him from asserting title to the interest claimed by plaintiff in the case at bar.

2. An unrecorded quitclaim deed from plaintiff's grantor to plaintiff, construed together with a contract entered into between them at the same time, constituted plaintiff the agent or attorney of the grantor to conduct litigation, sell the property described in the deed, and divide the proceeds, and did not make plaintiff a bona fide purchaser or give him a title that can prevail as against the subsequent estoppel of his grantor by the judgment and decision in the former suit.

Action in the district court for Ramsey county to determine adverse claims to certain real estate. The answers of James Byrd

[1] Reported in 138 N. W. 421.

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Hewitt and Walter Hewitt alleged that they were the owners in fee simple of an undivided two-thirds of the property. The answers of defendants R. C. Jefferson, Wright, Barrett & Stilwell Company, and the Minnesota Transfer Railway Company, alleged that plaintiff's claim of interest was derived from A. K. Barnum, that he held all such claim of interest merely as the agent of Barnum; and that the answering defendants respectively purchased portions of the premises described from defendant Jefferson, without notice or knowledge of any title or interest in plaintiff or in either of the defendants Hewitt. It further alleged that plaintiff and defendants Hewitt, by the decision in the case of Barnum v. Jefferson and others,[1] were barred from maintaining this action, or asserting any right or interest in the premises described.

The case was tried before Brill, J., who found that neither plaintiff nor defendants Hewitt nor Wright, Barrett & Stilwell Company had any interest in the property, and that defendant Jefferson was the owner in fee of the property, subject to certain rights in a portion thereof in defendant Minnesota Transfer Railway Company, under a certain contract of sale to it by said Jefferson. From an order denying his motion to set aside the decision and for a new trial, plaintiff appealed. Affirmed.

William G. White, pro se.

John E. Stryker, for respondents.

Bunn, J.

This action is for the partition of certain land which formerly was a part of Bernheimer avenue in St. Paul. Plaintiff claimed to own an undivided one-third interest in the land, and each of defendants Hewitt an undivided third. The trial court decided that neither plaintiff nor the Hewitts had any interest in the land, but that the same was owned by defendant Jefferson, subject to a contract with the defendant railway company. Plaintiff moved for a new trial, and appealed from the order denying such motion. The ultimate question here is whether plaintiff had any interest in the land. His claim of title vests upon the following facts:

In 1889, a portion of Bernheimer avenue, one of the public streets

[1] [See 109 Minn. 1, 122 N. W. 453.]

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of St. Paul, was vacated. At that time Allie Hewitt, James Byrd Hewitt and Walter Hewitt owned as tenants in common lot 60 of Hewitt's outlots, first division, which adjoined the vacated street. Through conveyances and a mortgage foreclosure, all after the vacation of the street, defendant Jefferson became the owner of lot 60. Allie Hewitt died in 1898. By her will she devised to her son, Augustus Kirby Barnum, among other property, all her interest in Hewitt's outlots.

"All in trust, however, to receive, rent, have, hold, mortgage, sell and convey and otherwise dispose of the same or any portion thereof, when and on whatever terms he shall see fit, as fully as though he were seized in fee simple thereof in his own right, and the proceeds thereof to invest and reinvest when and where he shall see fit, and out of the net income thereof and of the investments arising therefrom to use for the support of himself and his children whatever he shall deem necessary.

"And should it be necessary in any case for his comfort to use more than the interest or income, I wish him to do so without restraint or control from any one else, but having in mind, however, my preference that he should keep the principal intact if he well can.

"And all of the said property and the investments and reinvestments of the proceeds thereof remaining at the death of my said son shall be disposed of as he, my said son, shall provide in his will. But should my said son die intestate, then that portion of the said property remaining at his death shall, one-half thereof, pass to and become the property of then living children of my said son and the issue of any deceased child in equal shares, so that each living child shall receive like portion and that all the issue, if any, of each deceased child shall altogether receive the same portion as a living child, and the other one-half of such remaining property shall become the property of and pass to my sister, Rebecca E. Miller, if she shall be then living, but if she be dead, then to whomsoever she shall have designated in her will to receive the same."

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December 15, 1906, Augustus Kirby Barnum executed and delivered to plaintiff a deed, by which "in his capacity as trustee under the last will and testament of Allie Hewitt, deceased," he conveyed to plaintiff all those portions of Bernheimer avenue and other named streets embraced within the limits of Hewitt's outlots. The deed recited the trusts in the will, and the power of sale therein given Barnum, and purported to be executed by virtue of the power given Barnum in the will. At the same time, and as a part of the same transaction, plaintiff, Barnum and one Soucheray entered into a contract reciting the conveyance by Barnum to plaintiff, and providing that plaintiff and Soucheray should convert into cash the real estate so conveyed by Barnum, and to that end institute and carry forward all necessary suits, pay all costs and expenses thereof, and divide the proceeds of the property when sold, one-half to Barnum, and one-half to plaintiff and Soucheray.

In March, 1910, Barnum "in his individual capacity and also in his capacity as trustee" gave another deed of the same property to plaintiff. Neither of these deeds was ever recorded, nor was the contract.

Under the doctrine of White v. Jefferson, 110 Minn. 276, 124 N. W. 373, 641, 125 N. W. 262, Allie Hewitt, at the time of her death, owned a one-third interest in the land in question. The writer is firmly convinced that the doctrine of that case is unsound, but it must be adhered to in the present case between the same parties. If therefore plaintiff now has Allie Hewitt's interest, through her will and the deeds from Barnum, he is the owner of a one-third interest in the property involved, each of the Hewitts the owner of one-third, and defendant Jefferson has no title.

The claim of defendant Jefferson is that Barnum was estopped to claim title to the land in question by virtue of the decision and judgment in an action brought by Barnum and the Hewitts against Jefferson and others, and that plaintiff took no title from Barnum under either deed.

We find little difficulty in agreeing with the conclusions of the trial court that the judgment in the Barnum case constituted an estoppel. In the complaint in that case plaintiffs alleged that the legal

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title to the tract in question, and other property, was in defendants Jefferson and Hoard, but that plaintiffs were the owners of the equitable title. The answer admitted that defendants had the legal title, and denied that plaintiffs had any right, title or interest. The complaint referred to an exhibit for the description of the real estate involved in the action, and in this exhibit the part of Bernheimer avenue claimed in the case at bar was explicitly described. After a trial, the court rendered a decision in favor of defendants, finding that the title was in Jefferson and Hoard, and that plaintiffs had no right, title or interest to or in the premises. Pursuant to this decision, judgment was entered in the district court, by the terms of which it was adjudged "that the plaintiffs herein take nothing by this action, and that the defendants herein have and recover" costs. This judgment was affirmed by this court. Barnum v. Jefferson, 109 Minn. 1, 122 N. W. 453.

It is true that the question of Barnum and the Hewitts' title to the strip of vacated street, as distinct from their claimed ownership of the property of which Jefferson and Hoard had the legal title, was not litigated. Indeed, the case hinged upon the existence of the agreement claimed by plaintiff to have been made. But this is in no way controlling. The issue involved in the case at bar, the title to the vacated street, was presented by the pleadings in the former case, and might have been litigated. As said by Chief Justice Start in Veline v. Dahlquist, 64 Minn. 119, 66 N. W. 141, "a judgment on the merits constitutes an absolute bar to a second suit for the same cause of action, and is conclusive between parties and privies, not only as to every matter which was actually litigated, but also as to every matter which might have been litigated therein." In Prendergast v. Searle, 81 Minn. 291, 84 N. W. 107, Mr. Justice Brown said: "It is elementary that a judgment in an action is final and conclusive between the same parties as to all questions or issues presented by the pleadings."

The rule is a familiar one and we apply it here. We do not consider that the cases of Dixon v. Merritt, 21 Minn. 196; McClung v. Condit, 27 Minn. 45, 6 N. W. 399, or Augir v. Ryan, 63 Minn. 373, 65 N. W. 640, announce any different rule that is applicable

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to the facts in this case. The distinction between estoppel by judgment and estoppel by verdict is not important in this case. The issue as to the ownership of this vacated street was expressly made by the pleadings in the former suit; that it was not actually litigated may have been because the legal title was admitted. In any event it is not a case that calls for a decision that, because there is no finding or no evidence that the point was actually litigated and determined in the former suit, there can be no estoppel. The fact of ownership, the vital fact in the case, was litigated and determined. The most that can be said is that the legal point upon which plaintiff now claims title was not presented in the former case, and not decided. This is no reason why the former adjudication is not a bar.

It is urged that because the judgment itself did not adjudge title in defendants, there could be no estoppel. But we look to the findings to see what was decided, to interpret the judgment. It there appears clearly that it was determined that plaintiffs had no title, and that defendants were the owners. Plaintiff contends that the judgment did not give title to defendants, was not a link in their chain of title, under the rule in Minnesota Debenture Co. v. Johnson, 94 Minn. 150, 102 N. W. 381. This may be conceded, but it does not help plaintiff. Though the judgment was not a link in defendant's title; though it did not operate to transfer the Barnum and Hewitt title to Jefferson as against all the world, it does not follow that it might not operate as an estoppel by verdict to prevent the assertion of title by Barnum and the Hewitts, or their privies. Plaintiff must show that he has an interest in the land that he seeks to have partitioned in this action. He can prevail only if he shows a title in himself, not merely by showing that another has no title. We think it clear that there was an estoppel as against Barnum and the Hewitts.

It remains to be considered whether plaintiff took any title from Barnum that gives him an interest in the land that is not cut out by the estoppel of his grantor.

The trial court decided that the first deed from Barnum "in his capacity as trustee" under the will of Allie Hewitt, conveyed no title because the trust was an invalid one, and the question of the validity

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of this trust was argued in this court. But, conceding its invalidity, we are not prepared to hold that, were it not for the contract entered into as a part of the transaction, plaintiff did not acquire thereby all the interest which Barnum had, either as trustee or as the owner of the legal title. We must however consider the transaction as a whole, and look to the terms of the contract to determine whether plaintiff should be considered a bona fide purchaser of Barnum's interest, or merely his agent and attorney to conduct necessary litigation, sell the property and turn over the proceeds to Barnum, less compensation for his services and those of Soucheray. The contract seems to leave no reasonable doubt on this point. It was certainly not intended that plaintiff should become the owner of Barnum's interest. He was obligated to conduct litigation, if necessary, as it undoubtedly would be and was, to establish Barnum's title to a one-third interest in the vacated street. And he was bound to account to Barnum for the proceeds of such litigation and the sale. His interest was really in the fruit of the litigation, not in the real estate itself. His position was not far different from that of any lawyer who takes a case on a contract for a contingent fee. Looking broadly at the entire situation as disclosed by the deed, contract, and evidence, we must hold that plaintiff was only the attorney, agent, or trustee of Barnum, and that he cannot be considered an innocent purchaser, or even a purchaser, of Barnum's interest in the land.

All that is said above applies to the second deed from Barnum to plaintiff, and in addition, there is the fact that this deed was given after Barnum had become estopped by the judgment or decision in the case of Barnum against Jefferson. As we have said, neither of the deeds to plaintiff was ever recorded. It is impossible to hold that he has any title that can prevail in this action of partition.

We have carefully considered the other points presented by plaintiff and reach the conclusion that there was no error in the findings or in the omission to make certain findings, and that the decision of the trial court that plaintiff had no interest in the land sought to be partitioned was correct.

Order affirmed.

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SARAH J. NELSON v. NORTHERN PACIFIC RAILWAY COMPANY.[1]

November 15, 1912.

Nos. 17,707—(33).

Presumption not conclusive.

The presumption that a person who was killed by a train while crossing a railroad track at a street intersection exercised due care for his safety contains no elements differentiating it from the ordinary presumption of right conduct, and is not conclusive. It may be overcome by direct evidence or by facts and circumstances clearly showing a failure to exercise due care.

Same — evidence.

Force and effect will be given the evidence tending to overcome the presumption whether it appears from the plaintiff's case in chief or from that offered by defendant.

Negligence — verdict sustained by evidence.

In this case the evidence is held to justify a verdict of negligence against defendant, and exonerating decedent from contributory negligence.

Action in the district court for St. Louis county by the administratrix of the estate of William J. Nelson, deceased, to recover $5,000 for the death of her intestate. The answer admitted that on or about December 23, 1910, deceased was fatally injured by being struck by one of defendant's trains while upon or near Fifty-seventh avenue west in the city of Duluth; and alleged that the injuries of deceased were caused by his own negligence. The case was tried before Dibell, J., and a jury which returned a verdict in favor of plaintiff for $5,000 and in favor of defendant John Grimes. From an order denying defendant Northern Pacific Railway Company's motion for

[1] Reported in 138 N. W. 419.

Note.—As to presumption of care of person killed at railroad crossing, see note .n 4 L.R.A.(N.S.) 344.

The general question as to presumptions of care and negligence is treated in a note in 33 L.R.A.(N.S.) 1097.

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judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

C. W. Bunn and *Washburn, Bailey & Mitchell,* for appellant.

John Jenswold, Jr., C. R. Magney and *H. W. Lanners,* for respondent.

BROWN, J.

Action for damages for the alleged wrongful death of plaintiff's intestate in which plaintiff had a verdict, and defendant appealed from an order denying its alternative motion for judgment or a new trial.

The facts are as follows: Defendant operates a line of railroad at grade over and across Fifty-seventh avenue in the city of Duluth. Two main tracks and one side track extend over the avenue, at an angle of about forty-five degrees. Trains from Duluth pass over the north main track, and those going into Duluth over the south track. The side track is about nine feet from the south main track, and runs parallel with it across the avenue. The crossing is in a well-settled part of the city, and is much frequented and made use of for public traffic and travel. On December 23, 1910, at about 6:30 o'clock in the evening decedent was struck by a train passing over the south bound track into Duluth and killed. This action followed.

The complaint charged three distinct grounds of negligence, namely: (1) The failure of defendant to give any warning of the approach of the train, by ringing the bell or sounding the whistle of the engine; (2) excessive and unlawful speed of the train, and (3) the failure to provide either gates or a watchman at the crossing, contrary to the municipal regulations of the city. There was some evidence tending to show a failure to give the usual signals, but that ground of negligence was abandoned on the trial, and the question was withdrawn from the jury. The verdict rendered in favor of the engineer, a party to the action, negatived negligence in respect to the speed of the train, and, so far as the alleged negligence of the railroad company is concerned, the verdict was based entirely upon its failure to provide gates or a watchman at the crossing as required by the city regulations.

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It is contended by defendant on this appeal: (1) That the evidence is insufficient to establish the negligence of defendant, in the respect just stated, and (2) that decedent was guilty of contributory negligence as a matter of law.

1. The evidence tends to show that this particular avenue is in a well-settled part of the city, and that it was much used by both pedestrians and teams. Buildings for residence and other purposes are situated upon either side of the avenue, and the avenue was used at the point where the railroad crosses the same by the people living in that vicinity. The crossing was considered by the city council as sufficiently dangerous to require a watchman or gates for the protection of those making use of the same, and a resolution, requiring the company to maintain gates or a watchman, was formally passed and served upon defendant several months before the accident here in question. The defendant failed to comply with the requirements of the resolution, and at the time of the death of the decedent there were neither gates nor watchman at the crossing. We are of opinion, and so hold, that the question whether defendant was negligent in not providing a watchman or gates was one of fact and properly submitted to the jury. And whether the municipality lawfully could require the presence of a watchman or gate tender at all hours of the night, the fact remains that the presence thereof at the time in question, an early hour in the evening, might have prevented the death of decedent; at least a compliance with the municipal regulations would have been a timely warning to decedent, and relieved defendant from the charge of negligence. It might be unreasonable to require a watchman at such a crossing at all hours of the night, but the fact is well known that travel on such streets in our large cities is more conjested at the close of the business day than at other hours, and greater precautions are necessary for the protection of pedestrians. This question was properly submitted to the jury.

2. Was decedent guilty of contributory negligence as a matter of law? We think, within previous decisions of the court in similar cases, the question must be answered in the negative.

Decedent resided within a block and a half of and was familiar with the crossing and the operation of trains by the railroad company.

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He owned a barn on the opposite side of the railroad from his residence and was on his way to the barn when killed. It was a dark cold night, and the wind was blowing from the northwest, and decedent was facing the wind. A view of the railroad was obstructed for a considerable distance along the route necessarily taken by decedent. There were buildings along the street, and immediately adjacent to the side track were lumber sheds, piles of lumber and poles, and the evidence tends to show that a box car stood upon the side track nearly up to the foot walk leading across the right of way. With these obstructions decedent could not see an approaching train until he had passed the box car, and he was then within one or two steps from the track upon which the train was approaching. He was evidently struck by the engine of the train just as he was clearing the track. Decedent's course led him away from the approaching train at an angle of forty-five degrees, and as stated by the trial court there was evidence suggested that the place was a difficult one from which to hear, and that the sounds of the train were deceptive and misleading. He may have looked and seen the approaching train as he passed from behind the box car, and misjudged its distance away. It is a well-understood fact that a person cannot, with any degree of accuracy, judge of the distance of an approaching train when the only guide is the headlight of an engine. And if, as the evidence tends to show, decedent was aware of the approaching train just as he passed the car upon the side track, his first opportunity to observe its approach, and when he was substantially onto the track, the question whether it was prudent for him to go forward was one of fact for the jury. Bodin v. Duluth Street Ry. Co. 117 Minn. 513, 136 N. W. 302. The presumption is that he exercised his best judgment in the situation confronting him, and adopted what to him seemed a safe course to pursue. Knudson v. Great Northern Ry. Co. 114 Minn. 244, 130 N. W. 994; Simonson v. Minneapolis, St. P. & S. S. M. Ry. Co. 117 Minn. 243, 135 N. W. 745.

The fact that decedent was familiar with the crossing is not conclusive against him. Struck v. Chicago, M. & St. P. Ry. Co. 58 Minn. 298, 59 N. W. 1022. In that case decedent had formerly been a section hand on the part of the road including the crossing where

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he was killed, and was well acquainted with the situation. There was in that case, as in the case at bar, no living witness to the accident, and there was no evidence that decedent looked or listened for a train before attempting to cross the track. The court held the question of contributory negligence one of fact. We are unable to distinguish the case at bar from those cited and we follow the rule there laid down.

The presumption of due care on the part of the decedent in cases of this kind is not a new doctrine. It has been applied in varied forms of expression for many years in substantially similar cases. It embodies, however, no particular elements differentiating it from other presumptions of right conduct, and is not conclusive. It may be overcome by direct proof, or by facts and circumstances which lead to the conclusion that due care was not exercised. It matters not whether the evidence overcoming the presumption appears from plaintiff's case in chief or from the evidence offered by defendant. It is sufficient in either case to fully destroy and take away the effect of the presumption. It sometimes appears so conclusively that due care was not exercised that the trial court is justified in dismissing the action or directing a verdict for defendant. In the case at bar the evidence made the question one of fact.

Order affirmed.

A. S. PALMERLEE v. G. W. NOTTAGE and Another.[1]

November 15, 1912.

Nos. 17,726—(51).

Libel against public officer.

A publication which charges by way of insinuations and comparisons that cause exists for the removal of a public official, because of favoritism, nepotism, and malfeasance in office, is libelous per se.

[1] Reported in 138 N. W. 312.

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Same.

An article stating that it is easy to work the county commissioners *held* actionable; for the word "work," in the connection and manner in which it appears in the publication, conveys a reflection upon the competency and integrity of the officials.

Action in the district court for Dodge county to recover $4,000 for libel. From an order, Childress, J., overruling their demurrers to the complaint, defendants appealed. Affirmed.

Lord & Ronken, for appellants.

S. L. Pierce, for respondent.

HOLT, J.

The defendants own and publish a newspaper in Dodge county. In 1911 plaintiff was a member of the board of county commissioners. During the year there was an agitation to change the location of the county seat, and special election for that purpose was to be had on July 11. On June 29, 1911, the defendants published in their paper the article hereinafter referred to. Plaintiff brought this suit for libel, setting out two causes of action. Defendants demurred to each separately, and from the order overruling the demurrers this appeal is taken.

The article serving as the basis for the first cause of action is as follows:

"Do you know that on Friday, June 23, last, a petition was filed with Governor Eberhart asking for the removal of five of Hennepin county's commissioners from office? If not, we refer you to the Twin City papers of above date. The charge against these commissioners is 'favoritism, nepotism and malfeasance in office.' Do you realize that any taxpayer of Dodge county can bring a similar petition and use the identical claim that Hennepin county is using?"

We have no hesitancy in holding that the court rightly overruled the demurrer to this cause of action. The article conveys the thought that the county commissioners had been guilty of malfeasance in office. There is no occasion to initiate steps for the removal of a

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commissioner unless there has been official misconduct. A charge need not be made directly—indeed, the venom and sting of an accusation is usually more effective when made by insinuations. The floating calumny which each reader may affix to any and every official act which his aroused suspicion may lay hold of is capable of inflicting graver injury and injustice than a direct, specific charge, which may be squarely met and refuted, if untrue. The contention that the article is a legitimate criticism cannot be adopted, for no act of the commissioners is referred to. Calling names is not criticism.

As to the second cause of action, the complaint contains allegations that a committee called the "Press Committee" had been appointed to write newspaper articles favorable to removal of the county seat, and then avers that in an article in their paper of June 29, 1911, entitled: "Four-year-old Tommy Jones to His Teacher," the defendants publish the false and defamatory matter of and concerning plaintiff:

"Teacher—What was it created for?" (Meaning what was the said Press Committee created for.)

"Tommy—To bamboozle de people, work de county commissioners (dat is easy enough)."

It is to be noticed that an effort is made in the characters selected, the spelling and language used, to ridicule and reproach. Ability to work usually designates a good and redeeming quality in man. To say of a person that he is easily worked is applied generally in a disparaging sense. And in the language of the street or in such use of expression as here employed, to "work" a public official means to obtain from him something which the law does not permit. One definition in the Century Dictionary of "to work" is: "To manage or turn to some particular course or way of thinking or acting by insidious means." A public official who can be worked is commonly understood to be one who is either so incompetent as to be easily led away from the path of duty by the designing, or one who, for a consideration, would so depart.

The one doubt which may be suggested against the complaint on

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the second cause of action is that the county commissioners cannot act, except as a body; therefore to work the board one needs only work the majority; hence the minority is not touched by the accusation. But the charge is not made against the board as such, and the complaint alleges that the language was used of and concerning plaintiff. In alleging a cause of action for libel in this state (R. L. 1905, § 4152), "it shall be sufficient, instead of stating extrinsic facts showing the application to plaintiff of the defamatory matter complained of, to allege, generally, that the same was published or spoken concerning the plaintiff; and if such allegation is controverted, the plaintiff is bound to establish on the trial that it was so published or spoken." We think this complaint comes within the rule of Petsch v. Dispatch Printing Co. 40 Minn. 291, 41 N. W. 1034. See, also, a case in point, Wofford v. Meeks, 129 Ala. 349, 30 South. 625, 55 L.R.A. 214, 87 Am. St. 66, where a member of the commissioners' court (county commissioners) brought an action for libel, and it was urged against his right to maintain it that he was not named in the libel, and he may have voted against the making of the contracts charged to have been fraudulently made, "and therefore he is not, and cannot be, referred to in the publication. This proposition might be tenable, if the complaint admitted the making of the contracts charged to have been corruptly entered into by the publication. But it is absolutely without merit in the face of the averment that the entire publication is 'false, untruthful, scandalous, malicious, and defamatory;' and especially is this true where the defendants, by their motion to strike the substantial allegations of the complaint, confess the truth of every material averment thereof."

The order appealed from is affirmed.

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LAURA WEISS v. GREAT NORTHERN RAILWAY COMPANY.[1]

November 15, 1912.

Nos. 17,802—(53).

Questions for jury.

In an action for injuries received by a pedestrian who was struck at night by one of the defendant's engines at a grade crossing, evidence considered, and *held* sufficient to take the case to the jury upon the question as to whether the headlight of the engine was lighted, and also upon the ultimate issues as to negligence on the part of the defendant and contributory negligence on the part of the plaintiff.

Charge to jury.

Instruction as to the duty of the engineer to give warning upon discovering the plaintiff in a position of peril, considered and *held* not reversible error.

Damages.

Damages held excessive.

Action in the district court for Meeker county to recover $15,000 for personal injuries. In its answer defendant alleged that plaintiff's injuries were caused by her own negligence in not exercising care to ascertain whether trains were approaching. The reply was a denial of that allegation. The case was tried before Powers, J., who denied defendant's motion for a directed verdict and a jury which returned a verdict in favor of plaintiff for $7,500. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed, on condition plaintiff consent to a reduction of the verdict to $5,500.

W. L. Clift, J. D. Sullivan and *N. D. March,* for appellant.

Ernest W. Campbell, F. E. Latham and *C. A. Pidgeon,* for respondent.

[1] Reported in 138 N. W. 423.

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PHILIP E. BROWN, J.

Action to recover damages for personal injuries sustained by the plaintiff, in colliding with one of the defendant's trains on October 28, 1910, at a street crossing in the city of Litchfield, and in which she obtained a verdict for the sum of $7,500. This is an appeal by the defendant from an order denying its alternative motion for judgment in its favor or for a new trial.

The defendant's railway traverses Litchfield in an easterly and westerly direction, crossing Sibley and other avenues west thereof. The business and the larger portion of the residence section is located north of the defendant's right of way and tracks, while to the south thereof is situate the smaller part of the city. Sibley avenue, the main thoroughfare, runs north and south, has a sidewalk on each side of its roadway, and crosses the defendant's right of way and tracks about fifty feet east of the defendant's depot. The plaintiff, a young lady about twenty-three years of age, had resided for many years on this avenue, some two and a half or three blocks south of the said station, and was thoroughly familiar with the railway crossing, tracks, depot, buildings, and grounds of the defendant, and also with its custom of signaling by whistling one or more times upon the approach of its trains to the various streets which its tracks crossed, including Sibley avenue. About 7:30 o'clock in the evening of the day of the accident the plaintiff walked from her home, proceeding north, along the sidewalk on the east side of Sibley avenue, and, on arriving at a point about one and one-half blocks south of the defendant's tracks, heard a rumbling sound, but was not then certain that it was produced by a train. She became certain, however, that the noise referred to was made by a train approaching from the west, when she was about a block from the crossing. Nevertheless, she continued her journey, and just prior to stepping upon the tracks at the crossing she observed several persons on the opposite side of the street crossing over the tracks from the north to the south side, and when she was almost over the tracks she was struck by some portion of an engine approaching from the west, whereby she suffered the injuries complained of.

The matters stated above are uncontroverted. The plaintiff al-

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leges several acts of negligence in her complaint, including the running of the train through the city at excessive speed, the failure to give either the customary or statutory signals of approach to the crossing, by bell, whistle, or otherwise, and also that the headlight on the engine was unlighted. Furthermore, she claims that the evidence establishes each claim of negligence charged. All of these allegations and claims the defendant denies. The defendant, however, concedes that, if the headlight of the engine was unlighted at the time of the accident, such fact would constitute negligence on its part and we deem such is, in any event, the law. A consideration of the testimony, especially those portions detailing the physical facts, taken in connection with the instructions given, which must be taken to be the law of the case so far as the plaintiff is concerned, leads to the conclusion that the verdict rendered can in no event be sustained, unless the evidence adduced concerning the question of the headlight being unlighted at the time of the accident was sufficient to carry the case to the jury on this point. We adopt this view because we deem it clear that in the event of a determination that the evidence on this question was insufficient to sustain a finding in accordance with the plaintiff's contention, then the plaintiff must be held to have been guilty of contributory negligence, as a matter of law, in crossing the tracks under the circumstances disclosed. Was, then, the evidence sufficient to sustain a finding that the headlight of the locomotive was unlighted when the plaintiff was injured?

This question is so connected with the defendant's contention that the plaintiff was guilty of contributory negligence under the circumstances above indicated, that for convenience we will consider them together. And in this connection it should be remembered that the burden rested on the plaintiff fairly to satisfy the minds of the jurors as to the correctness of her contention in this regard, and that the same burden rested upon the defendant to establish contributory negligence on the part of the plaintiff, and furthermore that the elementary rule must be applied that, before the court can declare either the existence or nonexistence of negligence as a matter of law, the proof must be such that reasonable minds could not draw different conclusions concerning the presence or absence of due care therefrom.

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It is neither practicable nor advisable to state all of the evidence bearing upon these questions. Nor are we required to discuss the evidence for the purpose of demonstrating the correctness of the trial court's action. Demaris v. Rodgers, 110 Minn. 49, 124 N. W. 457; Prahl v. County of Brown, 104 Minn. 227, 116 N. W. 483. The following is, we think, a fair summary of the evidence pertinent to the present inquiry, when coupled with the facts already stated.

The center of the defendant's station is about two hundred and twenty-five feet from the east side of Sibley avenue, where the accident occurred, and before passing onto the track near the point where she was struck the plaintiff could have seen the headlight of the approaching engine, had it been lighted, for a long distance, and it appears in this connection that her eyesight and hearing were normal. The night was very dark, and a high wind was blowing from the northwest. There was evidence sufficient to show that neither the street near where the accident occurred nor the defendant's right of way was lighted, and that there were no lights in the defendant's depot or grounds. The plaintiff, an intelligent young woman, testified that she saw no headlight or train approaching, though she was mindful of the fact that one was coming from the west, and continued to look therefor up to the time she was struck, and that she heard no bell or whistle except one sharp blast immediately before she was struck. Other witnesses traversing the same sidewalk a short distance behind her heard no bell or whistle except a whistle for the station and three sharp blasts simultaneously with the accident, and did not see the accident, the latter fact apparently due to no other reason than the absence of light, though they did see the train pass the crossing and noticed that a dead engine was a part of the load. The engineer testified that he first saw the plaintiff when his engine was about the middle of the depot, and when she was from twenty to thirty feet south of the track, towards which she was walking, according to his estimate, "medium," with her head somewhat down, and that he last saw her when she stepped into the light of the headlight—which, according to his testimony, shone over the track and sidewalk to a considerable extent,—and attempted to cross the track,

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but he did not see the engine strike her. The engine messenger, who was in the cab of the engine, testified that he saw the accident, but could not see whether it was a man or a woman that was struck, or what part of the engine struck the plaintiff. The fireman testified that he lit the headlight of the engine at the station west of Litchfield, and that when the train stopped after the accident, about two thousand feet east of the crossing, he went to the front of the engine to ascertain the condition of the headlight, and found it still burning, and other employees of the defendant testified to the effect that the headlight was lighted. Its employees also testified that the train made a great deal of noise in approaching the station, which evidence was corroborated by other witnesses, and that the usual and statutory signals, by whistle and bell, were given on approaching and passing through the city, including three sharp blasts just prior to the accident. The employees estimated the speed of the train at from ten to fifteen miles an hour, while the plaintiff's witnesses estimated it at twenty. It also appears that two small "classification" lights were burning on the front of the engine.

Each case of this kind must be determined upon its own facts, and after a careful consideration of all the evidence in this case, in connection with the argument made and the authorities cited by the defendant, we cannot hold that the jury were not justified in believing the plaintiff's version of the accident. Nor can we say that, because other witnesses having a side view of the train saw it pass the crossing, the plaintiff, from her viewpoint, must have seen it as it approached. True it is that this approaching train must have made considerable noise, but it should be remembered that a high wind was blowing, which might easily have interfered with the plaintiff's hearing it, and that it is difficult, if not impossible, to determine how far a train is distant from its noise alone. We are asked to hold that the plaintiff, being aware that a train was approaching from the west, should not have attempted to cross the track, even if she heard no signals and saw no lights, because, it is argued, the use of signals and lights is principally to warn persons of approaching trains, and hence their absence cannot be taken into account by one

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who knows that a train is coming. Of course the knowledge that a train is approaching is an important circumstance to be considered, together with other circumstances, on the question of contributory negligence, but we cannot hold that under the evidence in this case the plaintiff must be deemed to have been guilty of such negligence simply because of such knowledge. The main conflict in the evidence concerns the headlight. To determine the question adversely to the plaintiff's claim, we would have to hold that the plaintiff was either entirely faulty in her recollection of the occurrence or that she testified falsely. This, we think, would invade the province of the jury. The circumstance of the engineer's seeing the plaintiff so short a period before her injury, the testimony of the engine messenger that he could not determine what part of the engine struck the plaintiff, or even whether it was a man or a woman that was struck, taken in connection with the testimony of the witnesses who were walking behind the plaintiff on Sibley avenue, to the effect that they did not see the accident, though in the darkness the headlight, if lighted, would naturally have created considerable light at the place of the accident, constitutes strong corroboration of the plaintiff's version, and makes the question one for the jury.

In reaching this conclusion, we have not overlooked the written statement made by the plaintiff on the day after the accident, at the instance of an employee of the defendant.

In several respects this case is similar in its facts to Knudson v. Great Northern Ry. Co. 114 Minn. 244, 130 N. W. 994, which, generally speaking, is controlling here.

The court instructed the jury among other things, as follows:

"If you should find from the testimony that the engineer did discover the plaintiff when the train or engine was some one hundred or one hundred fifty feet west of the crossing, and that he discovered that the plaintiff at the same time was not observing the train, and apparently did not see or notice the train, but was approaching the railway track and crossing as if unconscious of the approach of the train, then it would be the duty of the engineer to immediately give signals or warning that he might make known to her, if possible, the

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near approach of the train. And if you find that condition of things and he did not do so immediately, it would be negligence on the part of the engineer and the defendant, as the engineer was its servant."

The defendant complains of this instruction, but we find no reversible error therein.

The defendant contends that the amount of the verdict is excessive, that it was not justified by the evidence, and was the result of passion and prejudice on the part of the jury. The plaintiff was earning $35 per month at the time of the accident, and it appears that up to the date of the trial, June 14, 1911, she was unable to perform any services, and that the probabilities were that such condition would continue for a considerable period. The fact that she was severely injured by the accident and was subjected to much physical and mental suffering, cannot be gainsaid. But we have examined the record with care on this question, and, while realizing that it is a delicate matter to interfere with the determination of the jury in this regard, we hold that the evidence tending to show the likelihood of the plaintiff's complete recovery is so convincing that under the instructions given the verdict rendered cannot stand.

Ordered, therefore, that a new trial of this action be granted unless the plaintiff within twenty days next after the filing of the remittitur in the district court files therein her consent to a reduction of the verdict to $5,500, in which case judgment will be entered therein for the amount of the verdict as thus reduced, together with interest thereon from the date of the verdict.

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NELS BRUCE v. J. C. HOIDAL and Another.[1]

November 15, 1912.

Nos. 17,832—(139).

Creditor's bill — complaint defective.

A complaint in the nature of a creditor's bill, from which it appears that another action has been begun and is still pending to determine the liability of a resident defendant on the facts stated in the bill, such action not having proceeded to judgment or verdict, though a writ of attachment has been issued therein, but no property sought to be reached by the present suit has been levied upon, *held* demurrable, for the reason that plaintiff has neither exhausted nor fully made use of the legal remedies afforded in such pending action.

Action in the district court for Hennepin county to determine that defendant Weum hold the title to certain land in Polk county in trust for defendant Hoidal, and to permit plaintiff to issue a writ of attachment against the land until the final determination of two other actions by plaintiff against defendant Hoidal. From an order, Dickinson, J., sustaining defendants' demurrer to the complaint, plaintiff appealed. Affirmed.

Olof L. Bruce, for appellant.

Wright & Matchan, for respondents.

Holt, J.

Appeal from an order sustaining a demurrer to a complaint in the nature of a creditor's bill. To an understanding of the question presented, this short summary of the facts alleged may be sufficient: June 18, 1910, plaintiff contracted to buy from defendant Hoidal certain lands in Canada. In September following Hoidal induced plaintiff to turn over to him the purchase price, but has failed to deliver the deed as agreed, or give possession of the land, and by reason thereof plaintiff lost, in addition to the land, the opportunity to crop

[1] Reported in 138 N. W. 313.

Note.—The authorities on the question of conditions precedent to equitable remedies of creditors are collated in an exhaustive note in 23 L.R.A.(N.S.) 1.

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it, and he asks for specific performance or damages. In November, 1909, plaintiff claims Hoidal sold him twenty-eight shares of stock, fraudulently representing such stock to be worth par, or $100 per share. Nineteen of the shares thus sold were accepted by Hoidal as part payment of the Canada land, when he induced plaintiff to pay the purchase price as above stated, and at the same time he obtained possession of the other nine shares. These he refuses to return, and plaintiff avers that, when he ascertained that Hoidal had misrepresented the value of the shares, he offered to rescind. The shares were not worth more than one-third of the represented value. Plaintiff has begun two actions in the district court of Hennepin county against Hoidal, one of which is for specific performance or damages for breach of the contract to convey the said Canada lands, and the other for deceit in the sale of said nine shares of stock. Then it is alleged that on June 10, 1910, Hoidal, who had bought and paid for valuable land in Polk county, conspired with his uncle, Weum, the other defendant herein, to place such land beyond the reach of Hoidal's creditors, and for that purpose the conveyance was taken in the name of Weum, in trust for Hoidal. Hoidal has no other property, except certain real estate in Minneapolis, Minnesota, and it is averred that as to the latter he has placed mortgages thereon for more than its value, but that these mortgages were so placed for the purpose of defrauding his creditors and placing the property out of their reach. In said pending actions against Hoidal a writ of attachment issued; but there is no allegation that the same was levied either upon the Polk county land or upon the real estate in Minneapolis. Plaintiff in the present action asks that the court adjudge the legal title to the Polk county land to be in Hoidal, and that said land be attached and held to respond to any judgment that may be entered in said pending actions against Hoidal.

For the purpose of this decision we may assume that the allegations in the complaint are sufficient to show that the land in Polk county, although the legal title thereto is in Weum, is in fact Hoidal's, and may be reached by the creditors of the latter, regardless of the time the indebtedness was incurred. Therefore we may regard the pleading as in the nature of a creditor's bill. In this state the

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rule appears well settled that in such an action the complaint must show that the creditor has exhausted his remedy at law, or at least proceeded far enough to have obtained a judgment against defendant or a lien on the property by him fraudulently attempted to be covered up. Massey v. Gorton, 12 Minn. 83 (145), 90 Am. Dec. 287; Wadsworth v. Schisselbauer, 32 Minn. 84, 19 N. W. 390; Spooner v. Travelers Ins. Co. 76 Minn. 311, 79 N. W. 305, 77 Am. St. 651; Williams v. Kemper, 99 Minn. 301, 109 N. W. 242. However, where it appears that the remedy at law is unavailing, because the debtor has absconded or is a nonresident, equity will give relief. Overmire v. Haworth, 48 Minn. 372, 51 N. W. 121, 31 Am. St. 660; Rule v. Omega Stove & Grate Co. 64 Minn. 326, 67 N. W. 60.

But such is not this case. On the contrary, plaintiff has elected to bring two separate actions against Hoidal, without therein joining Weum, or attempting to reach property in Weum's hands belonging to Hoidal. He has therein obtained writs of attachment, but has not caused the same to be levied on the Polk county lands, nor on the Minneapolis real estate of Hoidal, so far as the allegations go. It occurs to us that the pleader has succeeded in showing that he has an ample statutory remedy. But, if he has not, he can, by the use of the attachment, secure himself, or at least obtain a position where he has some basis for asking equitable relief.

The cases of Pendleton v. Perkins, 49 Mo. 565, and Gates v. McClenahan, 124 Iowa, 593, 100 N. W. 479, relied on by plaintiff, do not sustain him, but are in accord with the holding of this court in Overmire v. Haworth, supra. It is not necessary here to consider the doctrine announced in Case v. Beauregard, 101 U. S. 688, 25 L. ed. 1004; Chamberlin v. Jones, 114 Ind. 458, 16 N. E. 178; Miller v. Hughes, 38 S. C. 513, 17 S. E. 366, and Early Times v. Zieger, 9 N. M. 31, 49 Pac. 723, to the effect that it is not necessary under certain conditions to exhaust the legal remedies against a debtor before suit in the nature of a creditor's bill; for, as above stated, it appears that in the actions pending plaintiff has remedies that he has not exhausted, nor used to an extent of becoming effective.

Order affirmed.

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TONY GRBICH v. PITTSBURGH IRON ORE COMPANY.[1]

November 15, 1912.

Nos. 17,869—(98).

Alternative allegations of fact — complaint sufficient.

Allegations of the complaint considered, and *held*, that they do not come within the rule that where the complaint alleges in the alternative two statements of fact, one sufficient to constitute a cause of action and the other not, they neutralize each other. The complaint states facts sufficient to constitute a cause of action.

Action in the district court for St. Louis county to recover $25,250 for personal injuries. From an order, Ensign, J., overruling defendant's demurrer to the complaint, it appealed. Affirmed.

Washburn, Bailey & Mitchell, for appellant.

Theo. Hollister and *Frank Hicks,* for respondent.

START, C. J.

Appeal from an order of the district court of the county of St. Louis overruling the defendant's demurrer to the complaint. The here material allegations of the complaint are to the effect following:

The defendant, at the times herein stated, operated an iron mine, known as the Brunt mine, near Virginia, in this state. On October 2, 1911, and for some time prior thereto, the plaintiff was in the employ of the defendant in the mine in the work of making gopher holes, which was done by making holes in the bank of earth which covered the ore, large enough so that those engaged in the work could crawl therein. The holes were so excavated and extended from twenty to thirty feet. They would then be loaded with explosives and fired, for the purpose of breaking up the bank so that it could be removed. The plaintiff, while engaged in such work at the rear of a hole extending into the bank some fifteen feet, heard a whistle

[1] Reported in 138 N. W. 309.

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blown in the open pit, and also heard other employees of defendant call to him to come out of the hole, as a blast was about to be set off in the open pit. Thereupon he immediately backed out of the hole, and when he was out of it, and in the act of raising himself to a kneeling position, an explosion occurred at that moment, and dirt and rock were thrown into his face and eyes, whereby his eyes were permanently injured and he sustained other serious injuries. It was the duty of the defendant to exercise reasonable care to furnish the plaintiff a safe place in which to work, and to warn and caution him of the dangers incident to his work, which were unknown to him. There were a large number of men in the employ of the defendant in the open pit of the mine, using dynamite and other explosives; and to do the work with reasonable safety it was necessary that the defendant have some person who should have charge and supervision of the use and handling of the explosives. The defendant had no such person in its employ, but allowed a large number of its employees engaged in such work, who used explosives, to go to one central point, and obtain supplies from time to time as they needed them, without supervision or oversight from any one. The defendant provided no place within the pit where such explosives should be kept, but allowed and permitted the men who used the same to have and leave the same about wherever they saw fit. It was the custom in the mine, during the time the plaintiff was working therein, when blasting was to take place, for the steam shovel to sound several blasts with its whistle, and for employees of defendant to call out "Fire!" in time to permit men who were engaged in work in gopher holes to get out of them and get to a place of safety. The plaintiff relied upon this custom being observed at the time he was injured; but the defendant on this occasion carelessly and negligently failed and neglected to observe the custom, or to have it observed, and did not give plaintiff the usual or customary notice or warning, and the explosion which injured plaintiff occurred immediately after he was notified that blasting was to take place, and before he had time to get to a place of safety. (After the explosion that caused plaintiff's injuries had taken place, there were upon the ground in the immediate vicinity where he was injured several

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sticks of dynamite. He does not know, and has no means of knowing, whether the blast that caused his injuries resulted from material thrown from a distance that struck and set off explosives lying upon the ground near where he came out of the hole, or whether his injuries were caused by material that was thrown by a blast a considerable distance away; but he does know, and alleges, that after he received notice and warning that a blast was about to take place at some place in the pit he was not allowed the ordinary and customary time after notice in which to get to a place of safety, and that his injury was the result of the carelessness and negligence of the defendant in regard to the matters above set forth.)

It is urged in support of the demurrer that the allegations of the complaint bring this case within the rule that where the complaint alleges in the alternative two statements of fact, one of which is sufficient to constitute a cause of action and the other not, they neutralize each other and demurrer will lie. Anderson v. Minneapolis, St. P. & S. Ste. M. Ry. Co. 103 Minn. 224, 114 N. W. 1123. This claim is based upon the allegations of the complaint which we have inclosed in parenthesis; but such allegations do not purport to be a statement of the ultimate facts constituting the defendant's alleged negligence. The allegations of the complaint, liberally construed as a whole, allege the duty and custom of the defendant to give its employees, including the plaintiff, timely notice of the explosion of a blast, so as to enable them to reach a place of safety before the explosion, a reliance upon the duty and custom by the plaintiff, and the negligent failure of the defendant to discharge the duty, in that the notice and warning that a blast was about to take place were not timely given, so that the plaintiff could get to a safe place, which resulted in dirt and rock being thrown by the blast into his face and eyes, whereby he was seriously injured. These allegations state facts sufficient to constitute a cause of action. Aho v. Adriatic Mining Co., 117 Minn. 504, 136 N. W. 310.

The alternative statements in question do not neutralize the substantive allegations as to the defendant's negligence and the resulting injury to the plaintiff. The alternative allegations are somewhat

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indefinite; but they may be fairly construed, as against a demurrer, that the plaintiff does not know whether his injuries were directly caused by material thrown by a blast at a distance, or from material thrown from the blast which struck and set off explosives lying on the ground near where he came out of the hole. It is clear that neither of these allegations qualifies or neutralizes the gist of the plaintiff's alleged cause of action, the defendant's negligence in failing to give him timely notice that the blast was about to be set off, whereby he was injured. We hold that the alternative allegations referred to do not bring this case within the rule as to such allegations, and that the complaint states a cause of action.

Order affirmed.

STATE ex rel. JOHN F. KELLY v. HENRY WOLFER.[1]

November 15, 1912.

Nos. 17,991—(268).

Habeas corpus — trial of appeal.

Since an appeal in habeas corpus proceedings is, by R. L. 1905, § 4602, required to be tried in this court in the same manner "as if the writ had originally issued out of" this court, errors and irregularities occurring on the trial below need not be considered.

Judgment — attack by habeas corpus.

Where a court has jurisdiction of the person and the subject-matter, and could render a judgment upon a showing of any sufficient state of facts, any judgment which it may render, however erroneous, irregular, or unsupported by evidence, will be sustained as against an attack by habeas corpus.

Judgment — sentence to reformatory — attack by habeas corpus.

Under R. L. 1905, § 5454, authorizing the court to sentence to the reformatory any person not less than sixteen nor more than thirty years of age, etc., and who has been convicted of a crime punishable by imprisonment in the state prison, the fact that a judgment of conviction of such a crime, upon which the defendant is sentenced to the reformatory, fails to state

[1] Reported in 138 N. W. 315.

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the age of the defendant, does not render it subject to attack on habeas corpus.

Act valid.

R. L. 1905, § 5455, amended by Laws 1911, c. 61, authorizing the board of control to transfer prisoners from the reformatory to the state prison, and vice versa, is not unconstitutional, as constituting a legislative attempt to vest administrative officers with judicial functions.

Upon the petition of John F. Kelly, the district court for Washington county issued its writ of habeas corpus directing Henry Wolfer, as warden of the Minnesota state prison, to have the body of Paul C. Kelly before the court. The substance of the petition for the writ is stated in the opinion. After hearing, the court, Stolberg, J., made findings and as conclusion of law quashed the writ and remanded Paul C. Kelly to the custody of respondent. From the order quashing the writ and remanding the prisoner, petitioner appealed. Affirmed.

John F. Kelly, pro se.

Lyndon A. Smith, Attorney General, and *C. Louis Weeks,* Assistant Attorney General, for respondent.

PHILIP E. BROWN, J.

On June 23, 1910, one Kelly was convicted, in the district court of Hennepin county, of the crime of forgery in the second degree, and was then and there sentenced to imprisonment in the state reformatory until he should "thence be discharged by due course of law or by competent authority." On February 23, 1912, by order of the state board of control, made pursuant to the authority vested in them by R. L. 1905, § 5455, the said Kelly was transferred to the state prison. On July 22, 1912, a writ of habeas corpus in his behalf was sued out of the district court of Washington county—the petition therefor alleging that his imprisonment was illegal and without authority of law, in that (1) there was an agreement between the prisoner and the trial judge, prior to the former's conviction, which was upon a plea of guilty, that his imprisonment under such conviction should not exceed eighteen months, and that the plea of guilty was entered in reliance upon such agreement, and in order

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that the prisoner might be cured of a drug habit; (2) that the judgment of conviction did not state on its face that the prisoner was "not less than sixteen nor more than thirty years of age," and thus failed to show the age limit of sentence to the reformatory, while in fact the prisoner was over thirty years of age at the time of his sentence; (3) that the law authorizing the prisoner's transfer to the state prison was and is unconstitutional and void, and that, as there is no law for his return to the reformatory, he should be discharged. The court below quashed the writ, and remanded the prisoner to the custody of the respondent; and this is an appeal from its order in such regard.

1. The appellant complains here of certain rulings below; but it is not necessary either to state or decide the questions thus sought to be raised, for under R. L. 1905, § 4602, an appeal in habeas corpus proceedings is tried in this court in the same manner, to quote the statute, "as if the writ had originally issued out of" this court. See 1 Dunnell, Minn. Dig. § 4142; State v. Riley, 116 Minn. 1, 133 N. W. 86. In view, however, of the fact that the case was submitted to this court upon the record made in the proceedings below, and precisely as if the trial here were upon an ordinary appeal, we will consider the point most earnestly urged by the relator in this connection, namely, that the bill of exceptions states that the original "writ, warrant, or other written authority" under which the prisoner was detained was not produced and exhibited to the trial court, to the extent of saying that the record does not bear him out in this contention.

2. Coming, then, to the first and second grounds of discharge alleged in the petition, as above stated, we find that neither of them can be sustained. When one is confined under the final judgment of a court, he can be released on habeas corpus only for jurisdictional defects. Such writ cannot be allowed to perform the function of a writ of error or appeal. If the court has jurisdiction of the person and the subject-matter, and could render a judgment upon a showing of any sufficient state of facts, any judgment which it may render, however erroneous, irregular, or unsupported by evidence, will be sustained as against an attack by habeas corpus. 1 Dunnell,

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Minn. Dig. § 4129; State v. Riley, supra. Tested by these rules, the grounds stated in the first and second subdivisions of the petition for the writ in the instant case cannot be sustained.

Furthermore, in regard to the second of these contentions, the records show that the prisoner was examined by the court on oath concerning his age before imposing sentence, and that he stated it to be twenty-nine years. The relator contends that this cannot be considered, or is at least open to contradiction by evidence introduced by him below to the effect that there was no such testimony; the basis of such contention being that the minutes of the court which showed such testimony were not signed by the judge. All that is necessary, however, to prove the minutes of a court, is a copy thereof, attested by the clerk and under the seal of the court, and this is what we find the record in the instant case.

And again, with regard to this second ground for a discharge alleged by the relator, we think that the customary presumption in favor of the regularity of a judgment must here prevail. See Ex parte Marlow, 75 N. J. L. 400, 68 Atl. 171; Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. ed. 89. See, also, In Matter of Gregory, 219 U. S. 218, 31 Sup. Ct. 143, 55 L. ed. 184. We have no statute in this state requiring that the judgment shall contain anything whatever concerning the age of the prisoner, and in the absence of such a statute we do not think any recital in this regard is necessary in order to validate a sentence to the reformatory. One might as well argue that, because our statutes forbid the sentence of a minor under a certain age to the state prison, every judgment of conviction for a crime punishable by confinement in such prison must show that the prisoner is over that age. There is nothing that militates against our conclusion in this regard in the cases cited and relied upon by the relator, namely, State v. Whittier, 108 Minn. 447, 122 N. W. 319; State v. Billings, 55 Minn. 467, 57 N. W. 206, 794, 43 Am. St. 525; State v. Kinmore, 54 Minn. 135, 55 N. W. 830, 40 Am. St. 305, and some others. None of these cases are in point, for all of them bear upon the question of jurisdiction of the proceedings. Here there was unquestionably jurisdiction of the person and the subject-matter, and if the sentence of the prisoner to the re-

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formatory was improper it involved a mere error or irregularity, which is not ground for discharge on habeas corpus. Ryan v. Rhodes, 167 Ind. 121, 76 N. E. 249, 78 N. E. 330; People v. Superintendent, 46 Misc. 131, 93 N. Y. Supp. 218.

3. The relator's last contention is that the statute, R. L. 1905, § 5455, authorizing the board of control to transfer prisoners from the reformatory to the state prison, is invalid under Const. Art. 3, § 1, as being a legislative attempt to authorize purely ministerial officers to exercise judicial functions. The generic question raised by this contention is not a novel one. It is long since that criminology gave us our modern conception of criminality, from which has arisen an ever-increasing tendency to regard "punishment" for crime as being not so much compensatory as reformatory, and from this tendency, in turn, have sprung laws greatly amplifying and extending the administrative functions incident to the execution of the penalties prescribed by law for crime and imposed by the courts upon those who have incurred the same. It is not at all strange then that, in the course of legislative attempts in the various states of the Union to meet the requirements of this extended administrative system, laws should sometimes be passed which at least seem to attempt to vest administrative officers with powers properly appertaining to the judicial or executive departments of the government. Bitter attacks have been made upon some of these laws, most notably upon the so-called indeterminate sentence system, with its credits for good behavior, upon the parole system, and upon the prison transfer system; such attacks being grounded variously upon the contentions that the legislation assailed attempts to vest administrative officers with the judicial power of sentence or the executive power of pardon, or else is an unauthorized delegation of legislative powers. See Murphy v. Com. 172 Mass. 264, 52 N. E. 505, 43 L.R.A. 154, 70 Am. St. 266; Com. v. Brown, 167 Mass. 144, 45 N. E. 1; Ex parte Marlow, supra; Miller v. State, 149 Ind. 607, 49 N. E. 894, 40 L.R.A. 109. In each of these cases the indeterminate sentence system was sustained, though not without serious consideration, and, in Indiana, some dissent. See, also, Fite v. State, 114 Tenn. 646, 88 S. W. 941, 1 L.R.A.(N.S.) 520, 4 An. Cas. 1108, where the credit system

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was sustained, subject to certain limitations, and the cases were reviewed, and In re Conditional Discharge of Convicts, 73 Vt. 414, 51 Atl. 10, 56 L.R.A. 658, where the validity of the parole system was considered. Likewise see In re Murphy, 62 Kan. 422, 63 Pac. 428, upholding the Kansas prison transfer act, and People v. Mallary, 195 Ill. 582, 63 N. E. 508, 88 Am. St. 212, declaring a somewhat similar law invalid. By citing these cases, however, we do not mean either to approve or disapprove of their holdings upon the specific questions therein involved. We cite them merely because they are pertinent to the considerations to which we have adverted and involve the same general principles which we must apply in the instant case.

Coming, then, to the matter immediately before us, the argument against the validity of the law in question is, in substance, as follows: That the legislature has no power to vest a ministerial body with judicial functions; that the imposing of a statutory penalty for a crime is a judicial function, and where the statute prescribes alternate penalties the selection of the penalty which is to be imposed in a particular case is also a judicial function; that the Minnesota statutes under consideration authorize confinement either in the reformatory or the state prison, it being within the discretion of the court which punishment shall be inflicted; but that the statute assailed authorizes the board of control subsequently to transfer from the reformatory to the state prison, and hence the final choice between the two penalties provided by statute is left to such board, who, in effect, are thus authorized either to review the action of the court in choosing the reformatory, instead of the state prison, as the place of the prisoner's confinement, or else to impose a new criminal penalty without judicial trial, for matters occurring subsequently to the original commitment. We think, however, that this argument is fallacious.

R. L. 1905, § 5052, provides: "Forgery in the second degree shall be punished by imprisonment in the state prison for not more than ten years." Under this statute alone—Laws 1911, p. 412, c. 298, providing for indeterminate sentences, not being in force at the time of the conviction in the present case—it would have been the

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duty of the court, upon the prisoner's conviction, to sentence him to the state prison for a definite term of not more than ten years. But R. L. 1905, § 5454, provides: "Any person not less than sixteen nor more than thirty years of age, convicted of a crime punishable by imprisonment in the state prison, and never before sentenced to a state prison or reformatory, may be sentenced to the reformatory, which sentence shall be without limit as to time. * * * Such imprisonment not to exceed the maximum term." And section 5451 provides that in similar cases, with some slight difference as to age not material here, the sentence may be to the state prison on the reformatory plan "in like manner and on like conditions as are provided for sentence to the reformatory."

These two statutes, taken together, purport to authorize the court, in its discretion, to sentence the prisoner either to the reformatory or the state prison for a nominally indefinite term, not to exceed ten years, for the crime here involved; such term, however, being legally considered to be ten years, subject to a prior termination upon certain contingencies not necessary here to mention. See Murphy v. Com. supra; Miller v. State, supra. Under the three statutes which we have cited, therefore, it appears that the penalty provided by law for the crime here involved was, to a certain extent, in the alternative, thus calling for the exercise of judicial discretion in determining which should be imposed.

But these statutes must be read in connection with still another statute, namely, R. L. 1905, § 5455. This section, as it stood at the time of the prisoner's conviction, and also as amended by Laws 1911, p. 80, c. 61, is as follows: "The board of control may transfer from the reformatory to the state prison, from the state prison to the reformatory, and from the state training school to the reformatory whenever, in its judgment, such transfer will be advantageous to the person transferred, or to the institution from which such transfer is made"—with certain other provisions not here material.

Therefore, by reading this section into the sentence of the court, which must be done (Miller v. State, supra; Rich v. Chamberlain, 107 Mich. 381, 65 N. W. 235; In re Murphy, supra), the only alternative feature of the penalty prescribed by the statutes lies in the

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length and character of the term, that is, whether for a definite period of not more than ten years, or for ten years, subject to a possible prior termination; and when the prisoner in this case was sentenced to the reformatory, the court exercised all the judicial discretion vested in it by the statutes or the Constitution, for, whether the sentence is to the reformatory or to the state prison, the board of control, which has charge of both institutions, has power under section 5455 to transfer from the one to the other.

But it is this power of transfer that is attacked as involving an exercise of judicial functions, and if it really does call for the exercise of judicial, as distinguished from merely administrative or regulatory, functions, it cannot, of course, be sustained. We think, however, that the power of transfer thus conferred upon the board is purely administrative.

As we have already indicated, one of the principal aims, if, indeed, not the predominant one, of our penal system, is reform, and such is the policy which controls the conduct and management of the state prison no less than of the reformatory. Practically every law enacted in this state for many years, relative to sentence and imprisonment for crime, evidences this aim; and this conception of "punishment" of necessity involves an extension of the administrative side of the penal system, and imperatively demands greater freedom and wider powers on the part of the executive and administrative officers in carrying out the sentences of the courts. This new conception of "punishment"—new in the history of jurisprudence, but old and well established in this state—likewise has a direct bearing upon the office of a judicial sentence, which is now and always has been merely to direct that the punishment provided by the law be administered to the person convicted of the crime. Anciently, when, under the barbarous doctrine of an eye for an eye and a tooth for a tooth, "punishment" was deemed to be, as the word implies, largely compensatory, the natural and logical conception of a sentence for a crime was that the "punishment" should be nicely graduated to the nature and circumstances of the offense; this idea being reflected in the Constitutions of some of the states by a provision that the punishment shall be proportionate to the offense, and this provision like-

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wise being interpreted as requiring that the prisoner should suffer in proportion to the lightness or the enormity of his crime. And so long as this compensatory conception of "punishment" obtained, it might seem logically to follow that the adjudging of the penalty with great certainty and precision was essential and necessarily involved the exercise of judicial functions, and that any law attempting to deprive the courts of any of their powers in this regard would be an invasion of the province of the judiciary. The modern conception of "punishment," however, and the one that, so far as we can ascertain, has always obtained in this state, takes practically no account of compensation; the only survival thereof being found in the attempt at prevention by means of deterring examples and by confinement of and restrictions upon criminals considered dangerous to be at large, which latter system, especially when viewed from the criminological viewpoint is closely analogous to the system of confinement of and restraint upon persons of unsound mind.

Obviously, then, the office of a judicial sentence for crime cannot, under this conception of "punishment," be altogether the same as when society demanded payment, complete and more or less in kind, for infractions of its laws. No longer is proportionate punishment to be meted out to the criminal, measure for measure; but the unfortunate offender is to be committed to the charge of the officers of the state, as a sort of penitential ward, to be restrained so far as necessary to protect the public from recurrent manifestations of his criminal tendencies, with the incidental warning to others who may be criminally inclined or tempted, but, if possible, to be reformed, cured of his criminality, and finally released, a normal man, and a rehabilitated citizen.

Such is the province of judicial sentence for crime in many of the states, and it should be the same, we think, in all of them. In any event, we are satisfied that this conception of a sentence is the only one that can obtain in this state. Neither in our Constitution nor in our statute law do we find any remnant of the compensatory idea of punishment. Our Constitution does not contain any provision which, by any process of construction, requires penalties to be weighed in the balance with crime. It follows, then, that a much

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larger field of operation has necessarily been thrown open to those to whose charge criminals are committed for the purpose of the execution of the sentences pronounced against them, and we will say, without further preliminary, that so far as we have found it necessary in this case to examine our laws in this regard, including the transfer law herein assailed, we have not found them obnoxious to any constitutional objection. As we have had occasion recently to say: "Constitutions are not made for existing conditions * * * nor in the view that the state of society will not advance or improve, but for future emergencies and conditions, and their terms and provisions are constantly expanded and enlarged by construction to meet the advancing and improving affairs of men." State v. City of Mankato, 117 Minn. 458, 465, 136 N. W. 264, 266, quoting from the opinion of Mr. Justice Brown in Elwell v. Comstock, 99 Minn. 261, 109 N. W. 113, 698, 7 L.R.A.(N.S.) 621, 9 An. Cas. 270.

Failure to heed these weighty words would necessarily result in political and social stagnation. The changes in the conceptions of "punishment" and of sentence for crime, to which we have adverted at some length, necessarily require that the constitutional division of the government into three departments should receive, so far as the question here under consideration is concerned, a more liberal construction than might have been logically possible when this provision was inserted in the first American Constitution, at which time the law had not, perhaps, abandoned the compensatory conception of punishment. We hold, therefore, that R. L. 1905, § 5455, authorizing the board of control to transfer to the state prison a prisoner originally sentenced to the reformatory, or vice versa, does not violate Const. Art. 3, § 1; for we consider this power to be a mere matter of administration and control, in thorough keeping with the broad and humane policy underlying our penal system. In support of this conclusion we might refer to the provisions of our statutes which indicate that the reformatory and the state prison are merely branches of one great institution, from which it might be argued that, as between the two, the place of confinement is not a judicial matter (see In re Murphy, supra; Rich v. Chamberlain, supra; O'Brien v. Barr, 83 Iowa, 51, 49 N. W. 68); and likewise we might,

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for the purpose of distinguishing them, discuss the case of People v. Mallary, supra, and other cases which may seem to be more or less in conflict with the conclusion which we have reached. But to do so would be but to invite controversy, predicated largely upon technical refinements as to the meaning of words and terms, such as "penal" and "infamous." We will say, therefore, that while we have carefully examined these statutes and cases, as well as the other cases to which we have been cited, and also many additional cases which we have found in the course of our own research, we base our conclusion primarily upon an independent consideration of our own Constitution and statutes, which we have endeavored to interpret in the light of the ideals and conceptions of the people of this state as reflected in its written laws.

It appears from the record that the prisoner in this case was transferred to the state prison upon his own request; but we have not allowed this fact in any way to influence our determination of the case, and the conclusion which we have reached is in no wise based thereon.

Order affirmed.

CHARLES A. O'DONNELL v. DAILY NEWS COMPANY OF MINNEAPOLIS.[1]

November 22, 1912.

Nos. 17,660—(23).

Offer and acceptance by telegraph — construction of messages.

A telegraphic offer of employment, which is manifestly the result of prior

[1] Reported in 138 N. W. 677.

Note.—As to time and place of consummation of contract when offer by letter is accepted by telegram, or vice versa, see note in 6 L.R.A.(N.S.) 1016.

As to validity of oral contract for a year's services to commence *in futuro* see note in 2 L.R.A.(N.S.) 738.

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verbal negotiations, and which alone does not purport to contain all the essential terms of a contractual offer, must be considered as though the language thereof had been used at the conclusion of the negotiations, or conversely, as though express reference to the substance of the negotiations had been incorporated in the telegram; and the terms of the contract created by a telegraphic acceptance of such offer are to be gathered from the telegrams and the negotiations taken together, and not from the telegrams alone.

Contract of employment — statute of frauds.

A contract for services, which by its terms shows that it is not to be performed or is incapable of performance within one year from the making thereof, is within the statute of frauds; but a contract for one year's services commencing on the date on which the contract is made, is not within the statute.

Same.

Defendant's telegraphic offer of employment and its letter explanatory thereof, and the plaintiff's telegraphic acceptance, *held* not to be sufficient writings to satisfy the statute of frauds.

Same — evidence.

Where the date for the commencement of the performance of a contract is shown by the same evidence which establishes the contractual consensus, such date must, for the purpose of determining the applicability of the statute of frauds, be deemed to appear from the terms of the contract.

Contract construed.

Contract for one year's employment considered, and *held* to show by its terms that the commencement of its performance was to begin in the future, thus bringing it within the operation of the statute of frauds.

Time of performance — evidence.

In determining the applicability of the statute of frauds to a contract of employment, the date of the contract will not be presumed to be the date for the commencement of its performance, where it affirmatively appears from the terms of the contract that a subsequent date therefor is contemplated.

De minimis non curat lex.

The doctrine of *de minimis* cannot be invoked to avoid the operation of the statute of frauds upon a contract which by its terms is not to be performed within one year.

Action in the district court for Hennepin county to recover $3,380 for breach of contract. The complaint, among other matters, alleged that on or about January 31, 1910, a contract was entered into between defendant and plaintiff (who was then residing in Pennsylvania) whereby defendant agreed to employ plaintiff as its advertis-

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ing manager for one year from the date of such contract, and plaintiff agreed to accept said employment and within the first week thereof to remove with his family from Philadelphia to Minneapolis; that defendant agreed to pay plaintiff, as compensation for his services under said contract and in reimbursement of the expenses which plaintiff might incur in so removing from Philadelphia to Minneapolis, the sum of $65 per week for each and every week during the year from and after the making of the contract. The complaint also alleged that plaintiff at Minneapolis on February 2, 1910, offered performance of said agreement on his part, but defendant refused to assign any duties to plaintiff and repudiated its agreement. The amended answer denied that defendant ever entered into any contract with plaintiff; and among other matters alleged that defendant had an oral conference with plaintiff about January 27, 1910; that at the end of the conference a matter had been raised as to whether he had given away confidential information and plaintiff notified defendant that it should have full power of investigation; that defendant made a proposition by telegram to give plaintiff $65 a week, and thereafter, upon receipt of a certain communication, on January 31 defendant's president directed a wire withdrawing the offer made, which as defendant believed reached plaintiff before he answered defendant's telegram. The reply admitted that in the conversations which preceded the making of the contract plaintiff told defendant he had had experience in the business of an advertising manager and considered himself competent to take employment in that capacity, and very possibly plaintiff may have said that, if employed by defendant, he would use his experience and knowledge of said business to the best of his ability; but no other statements were made or asked for.

The case was tried before Holt, J., who made findings and as conclusion of law ordered judgment in favor of plaintiff for $65. From the judgment entered pursuant to the findings, plaintiff appealed. Affirmed.

A. B. Jackson, for appellant.

Wilson, Mercer, Swan, Ware & Stinchfield, for respondent.

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PHILIP E. BROWN, J.

This is an action for damages for breach of an alleged contract for the plaintiff's employment as advertising manager for the defendant, the Minneapolis Daily News. The case was tried to the court without a jury. Findings were filed, it being held that the plaintiff was entitled to recover of the defendant the sum of $65, and judgment was ordered to be entered accordingly. Whereupon the plaintiff made request for substituted or additional findings, which request was denied, and judgment was entered as ordered. This is an appeal by the plaintiff from the judgment so entered.

The facts, as gathered from the undisputed evidence and the findings of the court, are as follows:

On January 27, 1910, the plaintiff came to St. Paul, met the president and general manager of the defendant corporation, and orally proposed to enter the employment of the defendant as its advertising manager at Minneapolis, at a salary of $60 per week, for the first year, and moving expenses from his then home at Germantown, Pennsylvania. No direct reply was made by the defendant's representatives to this proposition, but the parties entered into a general conversation with reference to employing the plaintiff as the defendant's advertising manager at Minneapolis. In the course of this conversation the defendant's president objected to the proposition as to the payment of the plaintiff's moving expenses, and suggested that he would prefer to pay the plaintiff a definite sum, $250 or $300, to cover such expenses, to which suggestion the plaintiff assented as being satisfactory to him. The plaintiff also stated that he wanted a contract for at least a year, but the defendant's representatives said nothing as to the length of time for which the contract was to continue, though they did intimate strongly that they did not wish the plaintiff to use a position with the defendant as a stepping stone to a position with some other newspaper. It was agreed between the parties that, if a contract should be made, the plaintiff could report for work at Minneapolis in about a week from the date of the conversation, or on February 7, and that such would be agreeable to the defendant. The negotiations then closed, without any contract having been made, but with the understanding that the plaintiff would

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receive a telegram upon his return to his home, relative to his application for the position. The plaintiff then, after receiving from the defendant's president a check for $75 to cover the expenses of the trip which he had made to St. Paul in order to have the conference above described, returned to his home in Germantown, where, on January 30, 1910, he received the following telegram from the defendant:

"Minneapolis, Minn. 1/29/10.

"To Charles A. O'Donnell,

"a. 43 Durham, St. Airy.

"Come for $65.00 per week, without payment of moving expenses. When can you report?

"J. Burgess, Minneapolis Daily News."

In reply to this message, the plaintiff, on January 31, 1910, sent to the defendant the following telegram:

"All right, will be there next Monday,"

which day fell on February 7.

After sending this message, but on the same day, he received a telegram from the defendant as follows:

"Have made other arrangements. Will not need you now."

And likewise, on the same day, he received the following letter from the defendant:

"Minneapolis, Minn., Jan. 29th, 1910.

"Mr. Chas. A. O'Donnell,

"243 E. Durham St.,

"Philadelphia, Pa.

"Dear Mr. O'Donnell:

"I wired you today as follows: 'Come for $65 per week without payment of moving expenses. When can you report?' I prefer to

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pay you $5.00 more per week salary than to pay your moving expenses, simply as a matter of bookkeeping and because it is not our practice to pay expenses of this sort. I hope that this will be satisfactory to you, and that you will come on the field at once.

"I may say that I am very much pleased at this arrangement myself, and am glad to have you associated with me in the conduct of the Minneapolis Daily News. I am expecting that you will be able to report by Feb. 7th.

"With kindest personal regards, I am,

"Yours for business,

"The Minneapolis Daily News,

"By J. Burgess,

"Manager."

Previously to the receipt of the telegram notifying him that he was not wanted for the position in question, the plaintiff had surrendered the lease for his home in Germantown, and had begun to pack and ship his furniture and household effects to Minneapolis; and on February 7, 1910, he reported at the office of the defendant in the said last mentioned city, ready and willing to commence work, but the defendant refused to allow him to do any work for it, its alleged reasons for such refusal being immaterial in the view which we take of the case. The plaintiff thereafter made diligent effort to find other employment, but failed to get any, except to the extent of earning $500 during the following year.

Aside from the ultimate questions presented to this court for determination, the above statement represents the substance of not only the findings made by the court, but also the substituted or additional findings requested by the plaintiff, and thus we are relieved of the necessity of passing upon the propriety of the court's denial of the plaintiff's request for additional findings, except, of course, in so far as such request may involve the ultimate questions involved. These questions are: (1) Was the contract which was entered into by the parties one for an indefinite period at a fixed salary of $65 per week, or was it a contract for a year's services at

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such salary? (2) If the contract was for a year's services, what must be deemed to be the date contemplated thereby for the commencement of its performance, this question being material upon the defense of the statute of frauds?

1. Upon the first of these questions we must hold, with the plaintiff, that the contract which was closed by the plaintiff's telegram of acceptance of date January 31, was not for an indefinite period, but for the term of one year. It seems clear to us that while the telegrams above quoted, taken alone, did not constitute a contract, yet that the defendant's telegram of January 29 must be considered in connection with, and as supplementary to, the negotiations which took place on January 27, and that when so interpreted it must be read as though it had been written out substantially as follows: "Referring to our negotiations of January 27, in the course of which you offered to take the position of advertising manager for the Minneapolis Daily News at a salary of $60 per week for the first year, with an allowance for moving expenses, we have decided to offer you $65 per week, without moving expenses." Such an interpretation of the telegram is, furthermore, strongly supported by the defendant's letter of January 31, explaining the telegram. And if such be its proper interpretation, we think it clearly follows that the offer made thereby was for a year's employment. Conversely stated, our conclusion is that the whole transaction which culminated in the defendant's offer by telegraph should be considered just as if the language of the telegram had been used by the defendant's officers at the conclusion of the negotiations which took place on January 27, and the offer made thereby had thereupon been accepted by the plaintiff in the words of his telegram of acceptance. All the circumstances of the transaction point to this conclusion, of which may be mentioned the character of the work contemplated, the distance which the plaintiff was expected to move, with his household effects and his family, the uneasiness of the defendant's manager lest the plaintiff would abandon the work soon after taking it up, and the plaintiff's expressed expectation of a year's employment, to which the defendant's officers made no objection. And in the latter connection we will say that as such of-

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ficers, being apprised of the plaintiff's expectation of a year's contract and then knowing that his proposition was based thereon, refrained from expressing themselves in this regard, and thereafter sent the telegram first above mentioned, pursuant to a secret intention that the contract should be subject to termination by them at will or upon a week's notice, then it does not now lie in the mouth of the defendant to assert such intention. We hold that the contract was for a period of one year at a salary of $65 per week. See Smith v. Theobald, 86 Ky. 141, 5 S. W. 394.

2. This brings us to the second question, which in its general form is: Was the contract within the statute of frauds, as being a contract not to be performed within one year from the making thereof? In its ultimate analysis, however, the question here is: What must be deemed to be the date contemplated by the contract for the commencement of its performance? For it is settled that a contract for services which by its terms shows that it is not to be performed or is incapable of performance within one year from the making thereof, is within the statute (Spinney v. Hill, 81 Minn. 316, 84 N. W. 116; White v. Fitts, 102 Me. 240; Chase v. Hinkley, 126 Wis. 75; Lee's Adm'r. v. Hill, 87 Va. 497; Gulport v. Reneau, 94 Miss. 904), while a contract for one year's services commencing on the date of the contract is not within the statute (Sanborn v. Fireman's Ins. Co. 82 Mass. 448); and it is also clear that the writings in the instant case are not sufficient to satisfy the statute. Palmer v. Marquette, 32 Mich. 274; Seymour v. Oelrichs, 156 Cal. 782.

Does, then, the contract here involved show that it was not to be performed, or was incapable of performance, within one year from the date on which it was made, January 31, 1910? The plaintiff contends that it does not so appear, insisting that it must be deemed to be for one year's services beginning January 31, and ending on the same date in the following year. The defendant, on the other hand, contends that the contract was for services beginning February 7. As between these two contentions, we hold with the defendant. That February 7 was the date on which the performance of the contract was to commence is, we think, manifest; and, moreover, as this fact is established by the same evidence which estab-

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lishes the contractual consensus, the date for the commencement of the performance of the contract must be deemed to appear on its face, or at least to be fixed by its terms. February 7 was the date in the minds of the parties throughout the negotiations, and such date was expressly incorporated in the contract by the telegrams and the letter above quoted. It was the date fixed as giving the plaintiff a reasonable time in which to reach Minneapolis from his home in another state, and the distance he would have to travel in order to reach Minneapolis precluded the possibility of his actually beginning work in that city on the date of his telegram of acceptance. Undoubtedly the parties could have contracted that the plaintiff's services, and his pay, should be deemed to begin January 31, but they did not do this. Nor did they leave the date undetermined. They fixed February 7 as the date when the plaintiff should come and take the position contracted for. Until that date his time was his own, to do with as he pleased, provided only that he reported to the defendant at Minneapolis on February 7.

Could it successfully be contended that the date of the contract was the date for the commencement of its performance, if March 7, or any later date, had been specified as the day on which the plaintiff was to report for work? If not, how, then, can the contention made here prevail. The only difference would be that an employer might more readily agree to pay a week's salary without service, in order to get a desired employee, than he would agree to pay a month's salary, or more, by way of an inducing bonus. But we do not think such an agreement is to be inferred in either case where the only evidence thereof is that the date specified as that upon which the employee is to report for work is subsequent to the date of the contract. If nothing whatever had been said about when the plaintiff was to report for work, there might be room for the plaintiff's contention that a contract is, if possible, to be construed so as to keep it out of the operation of the statute of frauds, and that where no other date is specified the date of the contract will be presumed to be the date for the commencement of its performance; but where, as in this case, the contract indicates the date when the services are to begin, such contentions are irrelevant. Lee's Adm'r. v. Hill,

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supra; Chase v. Hinkley, supra; White v. Pitts, supra; Sutcliffe v. Atlantic, 13 R. I. 480; Gulport v. Reneau, supra; Shumate v. Farlow, 125 Ind. 359; Smith v. Theobald, supra. See also note to Okin v. Selider, 138 Am. St. 611, et seq. And it makes no difference that the year is exceeded by only a week, for the doctrine of *de minimis* cannot be invoked to avoid the operation of the statute of frauds. Chase v. Hinkley, supra. "An hour more than the time specified is in law as fatal to the contract as though it were two, five, or a hundred years."

We have considered the cases cited by the plaintiff to sustain his contention that where no date for the commencement of performance is specified, the date of the contract must control, and also those, including Phipps v. McFarlane, 3 Minn. 61 (109), cited as holding that contracts should be construed with a view to sustaining them as against the operation of the statute of frauds; but, in view of our interpretation of the contract here involved, none of these cases are in point. Nor are we called upon either to assent to or to dissent from the doctrines promulgated thereby. We will say, however, that we think a contract should be construed according to the intention of the parties as gathered therefrom, without reference to the consequences, statutory or otherwise; and that if a contract, doubtful as to the date of the commencement of its performance, is held not to be within the statute, it should be so held solely because the statute covers only such contracts as affirmatively show by their terms that they are not to be or cannot be performed within a year, and not because the court deems obnoxious a law which the legislature has seen fit to place in the statutes and has allowed to remain therein for many years. See Cram v. Thompson, 87 Minn. 172, 175, 91 N. W. 483.

The true method of approach to the consideration of the rights here involved is first to determine the question of the existence of the contract, and thereafter to determine the applicability of the statute of frauds thereto. We think that a contract can be established in this case only on the theory that both of the parties understood that its performance was to commence February 7; for if there was no meeting of minds upon that term of the contract, no claim being made that any other time was fixed for the commencement of performance, and it

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being apparent that both parties understood that immediate performance or performance within a reasonable time was not contemplated, then no contract was in fact consummated, and the plaintiff would have no standing here whatever. But we are satisfied that there was a meeting of minds to the effect that performance of the contract should begin on February 7 and end one year from that date, with the resulting contract to that effect, to which we must apply the law as declared in the statute of frauds.

By way of answer to some of the claims of plaintiff's counsel to the effect that, as nothing was said by the defendant's officer, during the negotiations which led up to the contract, directly as to when its performance should commence, to which we have already adverted, it must be deemed to commence immediately, we will say that the logical effect of such a conclusion would require a holding that the plaintiff's compensation commenced January 31. We think that it would astonish a business man to learn that, under the law, if he hires an agent or servant at a weekly, monthly, or yearly salary, with the understanding that the employee is to report at some future date, he must, in the absence of an express agreement to such effect, pay the employee, not from the time when the subsequent performance of the service begins, but from the date on which the agreement for the future service is made. It would also, no doubt, equally surprise the servant, under like circumstances, to learn that he was legally entitled to such compensation during the intervening time in which he was engaged in attending to his own affairs. Contracts similar in their general aspect to the one under consideration, are of frequent occurrence; and we are not prepared to adopt a rule of construction which seems to us to be forced, unnecessary, and inequitable.

The contract in this case being, as we have held above, one which contemplated that its performance should commence *in futuro* and that the services contracted for should continue for one year from the commencement thereof, it follows that, in the absence of writing sufficient to satisfy the statute of frauds, the plaintiff was not entitled in any event to a more favorable judgment than he obtained.

Judgment affirmed.

HOLT, J., who tried the case below, took no part.

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TOWN OF WELLS v. STEPHEN A. SULLIVAN.[1]

November 22, 1912.

Nos. 17,741—(80).

Error to receive evidence.

Where a witness on cross-examination admits that he is not friendly to one of the parties, it is not proper on redirect examination to show by him why he was unfriendly. *Held*, upon the facts disclosed by the record herein, that the admission of such evidence was reversible error.

Action in the district court for Rice county for an injunction restraining defendant from in any way interfering with the free use of a certain highway. The case was tried before Childress, J., who submitted to a jury the question whether there was a road at the *locus in quo*, made findings, and as conclusion of law ordered judgment in favor of plaintiff, making permanent the temporary injunction theretofore issued. From an order denying defendant's motion for a new trial, he appealed. Reversed.

Anson L. Keyes, for appellant.

E. H. Gipson, for respondent.

START, C. J.

This action was brought in the district court of the county of Rice to enjoin the defendant from obstructing an alleged highway over his land. A controlling issue on the trial of the case was whether there was a public road at the *locus in quo*. This question was submitted to a jury, and a verdict returned that there was such a highway. The other issues were determined by the trial judge in favor of the plaintiff, and judgment was ordered for it. Thereupon the defendant made a motion for a new trial on the ground of an alleged error of law committed on the trial, which was duly excepted to. The motion was denied, and the defendant appealed from the order denying his motion.

[1] Reported in 138 N. W. 305.

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There is here no settled case containing all of the evidence, but a bill of exceptions showing the alleged error, and which contains, as certified by the trial judge, "all the evidence and proceedings necessary to explain it, and relevant to the matters therein objected to, or relevant to said matters."

It appears from the record that no legal proceedings were ever had in reference to the laying out of the alleged highway, and that, if in fact the *locus in quo* was a public highway, it was such by reason of a dedication thereof by the owner of the land. The plaintiff called a witness, Peter Orth, who gave material testimony tending to show such a dedication. On his cross-examination he was asked as to his feeling toward the defendant, whether it was friendly or not. The witness answered: "I don't like his way of dealing; that is all the feeling." On his redirect examination he was asked and permitted to answer, over the objection and exception of the defendant, a question as follows:

"Q. If your feeling is unfriendly, why is it unfriendly?"

"A. I can do it in five minutes. It is about 1903 he owed me some money. Well, I was trying to get the interest from him. I got some the second year, and that was all I got in six or seven years. Well, the thing went on. I used to send him letters, and I used to go to his house. I watched every time he came to town. He would slip out on the road when he noticed me coming. Well, I didn't get nothing out of him at all. I gave the notes to the bank. He didn't pay any attention to the bank. When it was getting a long delay, I gave it—I gave it to a lawyer, with object to begin action against him. That was two years ago last spring. Well, the next thing, I think, the statement that he made that he didn't owe me a dollar; that he had every dollar paid, and the last payment was made, and he had witnesses and he paid it the last time. He didn't have it paid. I had the note, and he had no receipt, and still he had the nerve to say he had paid every dollar. At the last term of court I got a judgment against him for over $400. He never appeared; at last I had to sue him to get the money out of him."

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The trial court gave the defendant permission to make his statement as to this matter; but he made none, nor was the witness cross-examined as to his testimony given in response to the question objected to. The defendant, as a witness on his own behalf, gave competent and material testimony tending to show that the *locus in quo* was not a public highway, by dedication or otherwise. The ruling of the trial court in receiving the testimony objected to is the only question presented by the record for our decision. The ruling was clearly erroneous; but the question here is: Was it prejudicial error? State v. Kight, 106 Minn. 371, 119 N. W. 56. The evidence objected to and received was of a character naturally and obviously tending to prejudice the jury against the defendant, and discredit him and his testimony. The ruling was, therefore, reversible error, unless it appears from the record that it did not prejudice the substantial rights of the defendant.

It is urged in effect by respondent in this connection that, inasmuch as the record does not purport to contain all of the evidence given on the trial, there being no settled case, it must be presumed that the error, if any, was harmless. This is not a correct statement of the law. See 2 Dunnell, Minn. Digest, § 7180. But, were it otherwise, it would not be applicable to this case; for the court's certificate to the bill of exceptions negatives any presumption that there was any evidence other than as therein stated. The bill of exceptions is sufficient to present the question whether the error was prejudicial. The record shows that the testimony of the witness Orth and that of the defendant as to the vital issue in the case, the dedication of the alleged public way, was conflicting, and that the natural tendency of the evidence erroneously received was to prejudice the substantial rights of the defendant. While a new trial for the erroneous admission of evidence should be granted with caution, and in no civil case where it fairly appears that the error was not prejudicial to the substantial rights of the appellant, yet we are constrained to hold upon the record in this case that the admission of the evidence complained of was reversible error.

Order reversed, and a new trial granted.

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L. A. DODGE and Another v. COUNTY OF MARTIN.[1]

November 22, 1912.

Nos. 17,882—(88).

Judicial ditch — charge to jury prejudicial.

On the trial of an appeal from the report of the viewers, in drainage proceedings, the instructions of the trial court are construed and *held* to have in effect laid before the jury for consideration the determination of the viewers in the matter of the assessment of benefits, and as so construed the instructions were prejudicial to appellants.

Appeal from viewers' report.

Such appeals bring the matter of damages and benefits before the court for trial *de novo*, and the amount awarded by the viewers is not a proper matter for consideration by the jury.

In proceedings in the district court for Martin county to assess the benefits arising from the construction of Judicial Ditch No. 14, L. A. Dodge and A. E. Jones demanded a jury trial to assess the benefits resulting to their land. The appeal was heard before Quinn, J., and a jury which assessed the benefits in the sum of $2,135, the exact amount fixed by the viewers in the proceedings. From an order denying their motion for a new trial, they appealed. Reversed and new trial granted.

J. E. Haycraft, for appellants.

Albert R. Allen, for respondent.

Brown, J.

In judicial ditch proceedings pending in the court below, appellants, landowners whose land was assessed for benefits to result from the construction of the drain, appealed from the assessment as made by the viewers and approved by the court, and demanded a trial of the issue by a jury, as provided for by Laws 1905, p. 317, c. 230. The appeal came on for trial, and the sole issue litigated was the

[1] Reported in 138 N. W. 675.

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question of benefits to appellants' land. The jury returned a verdict fixing the benefit at the sum of $2,135; the same being the exact amount fixed by the viewers. A new trial was denied, from which order this appeal was taken.

The motion for a new trial was founded in the main upon alleged erroneous instructions to the jury; and whether the instructions complained of were prejudicial to appellants presents the only question on this appeal.

The court in its charge to the jury referred to the statutes on the subject of drainage of wet and overflowed lands, and to the proceedings necessary to the completion of a drainage project. Among other things the court said that one of the essential steps was the ascertainment and the equalization of the amount each tract of land should bear toward the expense of constructing the drain; and to that end that the court was required at a certain stage of the proceedings to appoint viewers, whose duty it was to examine the affected land and assess the damages or benefits necessarily to result from the improvement. The jury was informed that, in compliance with the statutes, viewers had been appointed in this proceeding for the purpose stated, and that the viewers so appointed "went out and assessed the benefits which in their judgment would accrue to each of the pieces of land affected. * * * Those men qualified, went out and performed their duties, made their report to the court, as the law requires them to do, of what, in their judgment, were the benefits which each tract of land would receive; the amount that each tract would be benefited by the construction of such ditch system." The court further stated that upon the presentation of the viewers' report it became the duty of the court to examine the same and to approve, or reject or modify, the allowances made by the viewers, as the facts presented justified or demanded. In this connection the court further said: "Now, when the court makes its order, it is what is known as the final order, and it fixes the amount of benefits which it appears to the court is reasonable and right under all circumstances, as shown by the proofs offered." The court then stated that the law grants to persons affected by the ditch, and where lands are assessed for benefits, the right to demand a jury trial, and to thus review the

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action of the viewers and the court. That in the present case appellants were within their rights in appealing from the final order of the court approving the action of the viewers, and that the jury should determine the merits of the issue from the evidence presented to them. Following this the court again referred to the determination by the viewers in the following language: "I might say, so that you may clearly understand, that the viewers and the court should undertake * * * to assess the benefits so as to equalize the payments among the different lands that are affected by the ditch, so that each one will pay, as near as can be, in accordance with their actual benefits, no more and no less. That is the purpose of the law. That is why the viewers go out there, one of the principal reasons why the viewers are sent out there, why the court reviews it afterwards, and why finally, if a man asks for it, a jury is empanelled for the purpose of assessing benefits, to get it as near right, and to get it as near in accordance with what the actual benefits will be, as possible." The charge of the court in other respects clearly stated to the jury the rules of law controlling their consideration of the case, and was complete and unobjectionable.

An appeal of this character brings to the district court for trial de novo, the issue of benefits or damages, as the case may be, and should be there determined without reference to the conclusion reached by the viewers. The object of the law in granting the right of appeal is to afford the appellant the right to the independent judgment of a jury, uninfluenced by the result from which the appeal was taken. If in any such case the jury by the charge of the court, or otherwise, is led to the conclusion that consideration and respect should be given the assessment made by the viewers, the appellant is deprived of his right to the separate opinion of the jury, and his appeal becomes fruitless. In the case at bar we cannot escape the conclusion that the instructions complained of tended strongly to impress upon the jury that view of the case. That it had such effect is made apparent by the result. The verdict concurred exactly with the report of the viewers.

We are not to be understood as intimating that the court below intended to influence the jury in the suggested direction. All that

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the court said to them was abstractly correct, but it was unnecessary, and its natural tendency was to create an erroneous impression on the minds of the jury prejudicial to appellants. The viewers' report, including the amounts of benefits thereby awarded, was before the jury, not as evidence bearing upon the question of benefits, but as a part of the proceedings, and the jury could not properly consider the same upon the issue to be by them decided. Northern Pacific Ry. Co. v. Duncan, 87 Minn. 91, 91 N. W. 271. A reference to that report by counsel would have constituted error. Pierce v. Brennan, 88 Minn. 50, 92 N. W. 507; McKenzie v. Banks, 94 Minn. 496, 103 N. W. 497. And if such reference by counsel would constitute error, for a stronger reason would instructions of the court, in language naturally tending to impress upon the minds of the jury the importance of the viewers' determination of the subject matter of the litigation, constitute error. While, as already suggested, the instructions complained of stated correct propositions of law, and were not in fact intended to influence the jury, yet it is clear that such was the effect. The charge of the court must be construed from the standpoint of the jury, and the impression likely to be created by what the court said to them. Mailand v. Mailand, 83 Minn. 453, 86 N. W. 445. The natural effect of the charge in this case was to lay before the jury the conclusion reached by the viewers, leaving with them the impression that such report was proper for consideration in reaching their verdict.

Our conclusion, therefore, is that in this the court erred to the prejudice of appellants.

Order reversed and new trial granted.

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PETER BRANTMAN v. CITY OF CANBY.[1]

November 22, 1912.

Nos. 17,921—(97).

Question for jury.

Plaintiff suffered injuries from a gas explosion in his cellar. The evidence presented a question of fact for the jury as to whether or not such gas had escaped from a leak in the pipe supplying a street lamp.

Liability of municipal corporation for its negligence.

Where a city undertakes to serve both public and private convenience by maintaining a municipal lighting plant to light its street, and also furnish gas to private consumers, it is not exercising a governmental function so as to escape responsibility for negligence in the management of such plant whereby an injury has been caused to the person or property of an individual.

Action in the district court for Yellow Medicine county to recover $2,500 for personal injuries. The answer alleged that the injury was caused solely by plaintiff's own negligence. The case was tried before Powers, J., who granted defendant's motion to direct a verdict in its favor. From an order setting aside the verdict and granting a new trial, defendant appealed. Affirmed.

Johnson & Lende, for appellant.

Tom Davis, Ernest A. Michel, D. L. Kennedy and *John I. Davis,* for respondent.

HOLT, J.

The city of Canby, Minnesota, maintains a municipal gas plant to light its streets, and also to sell gas to private consumers. Plaintiff was occupying a building fronting on the main street in the city; in

[1] Reported in 138 N. W. 671.

Note.—As to liability of municipality for death caused by negligence in the performance of a governmental function, see note in 38 L.R.A.(N.S.) 151.

As to distinction between private and public functions of municipality, see note in 1 L.R.A.(N.S.) 665.

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front of the building and across the sidewalk was a street lamp; the gas from this lamp was supplied by a pipe leading from the gas main in the street and was laid some two feet below the surface, entering into the lamp-post at a somewhat greater depth through a "goose neck" or bent pipe of lead designed to prevent breaks when frost would heave the ground. Nearly parallel with the pipe leading to the street lamp, and some twelve or eighteen inches from it, was a consumer's service pipe extending under the sidewalk and leading to within three feet of the cellar stone wall of the building occupied by plaintiff, then up to the surface and through the floor which extended about four feet over the cellar wall, thus entering the restaurant conducted by plaintiff. Plaintiff was injured by a gas explosion when, having occasion to go to the cellar, he struck a match therein. He claims that the defendant negligently permitted a leak to occur in the pipe which supplied the street lamp, where such pipe was attached to the goose neck, that the gas from such leak followed along the service pipe, the ground there being loose and porous, and permeated the ground and wall into the cellar. When the testimony was all in, the court directed a verdict for defendant, but afterwards granted a new trial. Defendant now appeals.

The appellant claims that there was proof of a leak in that part of the service pipe over which defendant had no control, therefore a verdict in plaintiff's favor could rest on no better foundation than a mere guess as to whether the gas in the cellar came from the leak near the goose neck or came from that part of the service pipe under plaintiff's exclusive control. From an examination of the testimony we are of opinion that, had the jury found that the gas escaped from that part of the equipment over which defendant exercised sole dominion, it could not have been said that the finding was without support.

The main contention of appellant is: Assuming that the gas came from the leak at the connection with the street lamp, and that the leak was due to defendant's negligence, the city is nevertheless not liable to the individual injured in respect to the operation of its lighting system, because the negligence occurred in the performance of a governmental function, namely, lighting its streets for the public

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good. In any event, that it was not a leak in that part of the plant which had any connection with the service to private consumers. At the trial such was the view taken by the court, who concluded that the case was ruled by Miller v. City of Minneapolis, 75 Minn. 131, 77 N. W. 788. There plaintiff sued the city, claiming that it had negligently permitted the hydrant of its water system to become choked or clogged so that the fire department could not obtain water to extinguish the fire that consumed plaintiff's property. A demurrer to the complaint was there sustained on the ground that, although the city was not compelled to maintain a water system, still it was discharging a governmental duty in maintaining a fire department, and "for the purposes of protection from fire, the water plant and service must be regarded as a part of the fire department." In the instant case the gas lighting plant was maintained by the city, not only for lighting the street, but also to supply private consumers. Lighting its streets is not a governmental duty placed on the city. Miller v. City of St. Paul, 38 Minn. 134, 36 N. W. 271. It has the privilege and power to undertake the burden, but it may refuse or may grant a franchise therefor to others. We apprehend that if a franchise had been granted by the city to construct and operate this plant, and gas had escaped therefrom causing injury, an action would lie against the one who held the franchise. Gould v. Winona Gas Co. 100 Minn. 258, 111 N. W. 254. The city here conducted its plant precisely as would one to whom it might have granted a franchise, with perhaps this difference—that a municipality does not expect much profit, if any at all, from its ventures to serve the public and private convenience. The facts in this case do not sustain the contention that the city, in operating this lighting plant, was performing a purely governmental function, even if it be conceded that a distinction may here be made between that part of the equipment which served the public and that which served private consumers. Such a separation or distinction we regard unimportant.

In this state a city, in maintaining a board of health, a police or a fire department, discharges a governmental function pure and simple, and we believe as to these or similar functions, it has no power to escape the burden imposed by granting a franchise to any-

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one to perform in its place. But as to furnishing water, light, etc., for private consumers and public purposes combined, the furnishing of which is not imposed by law as a governmental duty, the city, if it undertakes so to do, assumes a position to those injured through its negligence therein which is not different from what would be the position of one to whom it had granted the right to furnish water or light. Snider v. City of St. Paul, 51 Minn. 466, 53 N. W. 763, contains some observations indicating that this defendant may not claim immunity from the consequences of negligence, because it was performing a governmental duty in operating this plant.

In this day, when the doctrine of public ownership by municipalities of public utilities is rapidly gaining ground, so that nearly all public utilities, so-called, which have heretofore been supplied by those who have been granted franchises therefor are now overtaken by the municipalities themselves, it occurs to us that private rights may be jeopardized unless it be held that in overtaking such utilities the municipality must exercise the same care towards the person and property of the individual that was required of one having obtained a franchise to maintain the same utility. The conclusion herein arrived at is supported by able opinions in Dickinson v. City, 188 Mass. 595, 75 N. E. 68; Esberg v. City, 34 Ore. 282, 55 Pac. 961, 43 L.R.A. 435. It may also be stated that in Hodgins v. Bay City, 156 Mich. 687, 121 N. W. 274, the language relied on to support appellant's position in this case, was obiter.

Order affirmed.

N. W. WILKINS v. BETTY HANSON and Others.[1]

November 22, 1912.

Nos. 17,923—(71).

Principal and surety — estoppel of creditor.

If a creditor informs a surety that the debt is paid or settled, and thereby lulls the latter into security, inducing him to take no steps to protect him-

[1] Reported in 138 N. W. 418.

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self, and the surety thus suffers damage, the creditor is estopped from thereafter proceeding against the surety.

Evidence — questions of fact.

Evidence considered and *held* to make a case for the jury on the questions whether the creditor stated to the surety that the debt was settled, whether the surety was thereby induced to take no steps to protect himself, and whether he thereby suffered damage.

Action in the district court for Clay county to recover $300 upon a promissory note. Defense of defendants Bayer and Beck is stated in the opinion. The case was tried before Nye, J., who directed a verdict against defendants Hanson and denied a motion to direct a verdict against defendants Bayer and Beck, and a jury who returned a verdict in their favor. From an order denying plaintiff's motion for a new trial, he appealed. Affirmed.

Christian O. Dosland, for appellant.

Charles S. Marden and *W. B. Douglas,* for respondents.

BUNN, J.

This action was to recover on a promissory note executed by the defendants Betty Hanson and A. Hanson, as principals, and by defendants Bayer and Beck as sureties. The Hansons did not appear at the trial, and a verdict was directed in plaintiff's favor as against them. As between plaintiff and defendants Bayer and Beck, the case was submitted to the jury, and a verdict returned in favor of said defendants. Plaintiff appeals from an order denying his motion for a new trial.

The assignments of error raise but one question: Was plaintiff entitled on the evidence to a directed verdict against defendants Bayer and Beck?

The defense was that after the maturity of the note, and at a time when the Hansons were preparing to move to Canada, the sureties, on requesting A. Hanson to pay the note, were informed by him that it had been paid, and that upon inquiring of plaintiff if the note had been paid, were informed by him that it had been settled; that had they not been "lulled to security" by this statement of plaintiffs,

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defendants could and would have protected themselves by collecting the note from the Hansons.

The law is well settled that, if a creditor informs a surety that the debt is paid or settled, and thereby lulls the surety into security, inducing him to take no steps to protect himself, the creditor is estopped from thereafter proceeding against the surety, if there is evidence tending to show that the surety was damaged; that is, that he might have protected himself, had he not been induced to take no steps to that end. 32 Cyc. 214; Childs, Suretyship & Guaranty, 265; Carpenter v. King, 9 Metc. (Mass.) 511, 43 Am. Dec. 405; Sioux Falls v. Kellog, 81 Iowa, 124, 46 N. W. 859; Auchampaugh v. Schmidt, 80 Iowa, 186.

The evidence was ample to justify the submission to the jury of the question whether plaintiff stated to defendants that the note had been settled, and the question whether defendants relied on this statement and were thereby induced to allow the Hansons to depart for Canada without taking any steps to protect themselves. The only doubt is whether defendants suffered any loss, that is, whether there is any showing that would warrant the jury in finding that they could have protected themselves had they made the effort. We have examined the record with care, and reach the conclusion that this question was for the jury. There was evidence tending to show that A. Hanson had recently received $800 on a life insurance policy, that he had a car loaded in part with personal property ready to transport to Canada, and that his wife, defendant Betty Hanson, owned a building, which had just been sold for some $700 more than the incumbrances thereon. While this evidence does not make a strong showing of actual damage to the sureties, we are satisfied that it is sufficient to warrant the submission of the question to the jury. We hold that the trial court was correct in denying plaintiff's motion for a directed verdict.

Order affirmed.

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STATE ex rel. ESIDOR LABOVICH and Another v. GEORGE T. REDINGTON.[1]

November 22, 1912.

Nos. 17,923—(71).

City charter — regulation of shows.

Under the charter of the city of St. Paul, the power to license and regulate the exhibition of shows of all kinds, including theaters and moving picture shows, is with the common council, is a legislative power, and cannot be delegated to the city clerk.

Same — construction of ordinances.

Certain ordinances passed by the common council considered, and *held* not to be an exercise of its legislative or discretionary power to license and regulate all shows and theaters, and that the council still retained the power to license and regulate such shows and theaters, including the power to grant or refuse a license in a particular case.

The district court for Ramsey county issued its alternative writ of mandamus requiring George T. Redington, as city clerk of the city of St. Paul, to issue to petitioners a license in the usual form, authorizing them to use their building as a theater for the conduct of a moving picture show, or show cause why he had not done so. Upon the petition for the writ and answer, the truth of the allegations of which was admitted by the respective parties, the relators moved for a peremptory writ and the respondent moved to quash the writ. The peremptory writ was denied and the alternative writ was quashed, Hallam, J. From the order denying the peremptory writ and quashing the alternative writ, relators appealed. Affirmed.

James E. Markham and *Benjamin Calmenson,* for appellant.

O. H. O'Neill and *J. P. Kyle,* for respondent.

BUNN, J.

Relators petitioned the district court for Ramsey county to grant

[1] Reported in 138 N. W. 430.

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a writ of mandamus requiring respondent, as city clerk of the city of St. Paul, to issue to them a license authorizing them to use a building which they owned as a theater for the conduct of moving picture shows. An alternative writ was issued on the petition, and respondent answered. On the petition, writ and answer, relators moved for a peremptory writ, and respondent moved to quash the alternative writ. The trial court denied the relators' motion, and granted the motion to quash. Relators appealed from this order.

The facts, as disclosed by the petition and answer, are as follows:

Relators are the owners of a lot on Selby avenue in St. Paul, on which they erected a brick building and equipped the same with the necessary seats and other furniture for use as a place of public entertainment, intending to present therein a series of moving pictures, "descriptive of interesting events and scenes, pictures that are instructive, educational and interesting," and to charge an admission fee to such entertainments. The plans and specifications for the building were submitted to the building inspector of St. Paul before its construction, and he approved the same, and issued to relators a building permit. Relators expended more than $7,000 in the construction and furnishing of the building.

An ordinance of the city of St. Paul provides that it shall be unlawful for any person or persons to exhibit any show or shows * * * or to perform any * * * theatrical or other performances or exhibitions whatever, for which pay is required, demanded or received, without having been previously licensed so to do by authority of the common council of the city; "provided, however, that the common council may, by resolution adopted by a two-thirds vote of all members elect, from time to time authorize such sum as they may deem proper to be received as an annual license from the opera house or any other hall devoted exclusively to public exhibitions." It is made the duty of every person desirous of exhibiting shows for pay to "make application to the mayor or common council of the city of St. Paul, or to the clerk, for a license, and the said license may be granted by the mayor, common council, or by the city clerk, for any concert or theatrical exhibition." It is further provided by this

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ordinance that the city authorities may grant a license in the manner above provided to "exhibit any show or shows, caravan or circus, to wit: Provided, whenever any person or persons are desirous of exhibiting any show or performance aforesaid before the meeting of the common council, the mayor or city clerk may grant such license until the next meeting of the common council."

Another ordinance fixes the amount of the license fee for circuses, traveling menageries, merry-go-rounds, shooting galleries and theaters. It provides that "all theaters shall pay a license fee of one hundred dollars ($100)."

In March, 1912, relators applied to the common council for a license to operate a moving picture show in their building. A resolution was introduced in the assembly fixing the license fee at $50, and directing the city clerk to issue the license to relators. This resolution was defeated. The building was located within a block of a public school, and opposition to the granting of a license came from parents of school children, teachers and the school board. In June, 1912, relators made a second application for a license to the common council, and a resolution was introduced granting the application on condition that no moving pictures should be displayed during school hours, or while children are on their way to or from school. This resolution met opposition from the same sources and was voted down. Thereafter relators applied to respondent as city clerk to issue the license, and tendered to the city treasurer the sum of $100, the amount fixed by the ordinance before referred to as the license fee for theaters. The city clerk refused to issue the license. The petition charges that such refusal was arbitrary and without cause, but the answer alleged that the city clerk knew of the two previous applications to the council, the proceedings in relation thereto, and of the opposition which there was to the granting of such license. The answer also alleged that relators, before constructing the building, were well aware of the opposition, and that at the time of the first refusal of a license by the council, not much more than the foundation of the building had been completed.

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Were the relators, on the above facts, entitled to a peremptory writ of mandamus requiring the city clerk to issue the license?

It is the position of the relators, in brief, that by the ordinances referred to the common council had directed the issuance of a license to any theater, including moving picture shows, on payment of an annual fee of $100, and that the city clerk, or the council itself, had no discretion to refuse a license to any such theater or show, no matter what its character or where located. In other words, the claim is that the council had directed the issuance of a license to relators, had exhausted its discretionary powers, and that nothing remained for the clerk except the ministerial or clerical duty of making out, executing and delivering the document constituting the license. Relators are forced to take this position, because it is conceded, as it must be, that the council could not delegate to the city clerk the legislative duty or discretion to determine whether in a particular case a license should be issued. The city charter gives the council the power "to license and regulate the exhibition of common showmen and shows of all kinds, and the exhibition of caravans, concerts and theatrical performances." There is no authority to license or regulate such shows in any other person or body. And clearly the council could not delegate such authority to the city clerk. Darling v. City of St. Paul, 19 Minn. 336 (389). Therefore, if the ordinances may be construed as delegating to the clerk or mayor any power to determine whether in a particular case a license should be issued, they are to that extent void.

The whole question then is this: Did the council, by the ordinances quoted, direct the clerk to issue a license to each and every theater and show upon payment of the license fee of $100, no matter what might be its character or location? Had the council, in other words, exercised its legislative or discretionary power in the matter, so that such power was exhausted? If it had not, if it still possessed the power to control and regulate such shows, and to grant or refuse a license in a particular case, clearly this writ was properly quashed.

A careful reading of the ordinances referred to in connection with the charter provision giving the common council power to license and regulate shows of all kinds, leads to the conclusion that the council

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had never passed an ordinance which can be fairly construed into the grant of a license to theaters or shows in general, no matter what their character or in what part of the city they might be located. The proviso that the common council may from time to time "authorize such sum as they may deem proper to be received as an annual license from the opera house, or any other hall devoted exclusively to public exhibition," followed by the ordinance fixing the license fee for theaters at $100, can be construed only as fixing the amount of the license fee, and not as granting authority to every person desiring to maintain such a hall for public exhibition to do so upon payment of such fee. There is much more in the power to "license and regulate" than the mere fixing of the amount of the license fee. It is not to be doubted that, under this power, the council could prohibit improper exhibitions, or exhibitions in portions of the city in which for reasons of the public welfare it was undesirable to have such exhibitions. The power given by the charter is to regulate, as well as to license. This clearly includes the power to prohibit. State v. District Court of Ramsey County, 114 Minn. 287, 131 N. W. 327.

Nor can we hold that the ordinance providing that licenses may be granted by the "mayor, common council, or by the city clerk" is an exercise by the council of its power to license and regulate. If this is to be construed as a delegation to the mayor or clerk of the legislative and discretionary power of the council to license and regulate, the provision is clearly void, as before stated. But the fair construction of this ordinance, construed as a whole, is that the mayor or clerk may grant a license until the next meeting of the council. It should not be construed either as delegating legislative authority to the mayor or clerk, or as determining that all "shows or theatrical exhibitions" were authorized to be given, upon payment of the license fee, and the ministerial act of issuing the license. The council might, perhaps, by a general ordinance defining the character of the shows permitted to be given, fixing the limits within which they might be exhibited, and other conditions, fully exercise its power and discretion, and leave the mere issuance of the license a purely ministerial duty intrusted to the clerk. But we think it has not attempted to do this. It has still retained the power to refuse a license in a

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particular case, where by reason of the character of the exhibition, or the proposed location, it is deemed contrary to public welfare to grant it. We are not concerned here with the question of the wisdom of the council's action in giving heed to the protests against moving picture shows in the vicinity of a public school, or with the question of the influence of such exhibitions upon children. Relators are not complaining of the action of the council. Their claim is that the council had no power to act, because such power had been exhausted by the passage of the ordinances we have considered. We do not sustain this claim.

Order affirmed.

STATE ex rel. E. W. Mc GILL v. ARTHUR E. COOK and Others.[1]

November 22, 1912.

Nos. 17, 969—(11).

Mandamus — demurrer to petition and to writ.

The respondent may demur to the petition and alternative writ in a mandamus case.

Mandamus — unincorporated associations.

A writ of mandamus will issue only to compel the performance by an inferior tribunal, corporation, board or person of an act which the law specifically enjoins as a duty resulting from an office, trust or station. Private domestic corporations and their officers are within this rule by virtue of the visitorial power of the state over them; but the writ does not lie to regulate the affairs of unincorporated societies or associations.

Upon the petition of E. W. McGill, the district court for Hennepin county issued its alternative writ of mandamus directing C. A. Cook, as clerk of Hiawatha Camp, No. 1931, Modern Woodmen of America, to draw up and sign a written order of that camp in favor

[1] Reported in 138 N. W. 432.

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of relator McGill for the sum of $235, and directing Arthur E. Cook, as consul of that camp, to sign the order as such consul, or show cause why they had not done so. The respondents demurred to the amended petition, and moved to quash the alternative writ, on the grounds (1) that there was defect of parties plaintiff and relator, and (2) that the amended petition did not set forth facts sufficient to entitle relator to the relief demanded. From the order, Jelley, J., overruling the demurrer to the amended petition, respondents appealed. Reversed.

Elijah Barton and *Harry A. Lund,* for appellants.

Spooner, Laybourn & Lucas, for relator.

START, C. J.

This is an appeal from an order of the district court of the county of Hennepin overruling the demurrer of the appellants herein to the amended petition in a mandamus case. The relator urges that the order is not appealable.

If respondent in mandamus proceedings may raise the question of the legal sufficiency of the facts stated in the petition and the alternative writ by a demurrer, it follows that an order sustaining or overruling a demurrer is appealable. The statute does not expressly provide that a demurrer may be interposed in such cases to the petition, or alternative writ, which must concisely state the facts showing the defendant's duty in the premises, but it expressly provides that a demurrer may be interposed to the answer. The statute also provides that: "No pleading or written allegation, other than the writ, answer and demurrer shall be allowed. They shall be construed and amended, and the issues tried, and further proceedings had, in the same manner as in a civil action." Sections 4558, 4561, 4562, 4563, R. L. 1905. These statutory provisions assimilate in many respects the practice in mandamus to that in ordinary civil actions. State v. County of Chisago, 115 Minn. 6, 131 N. W. 792.

The petition and alternative writ in mandamus cases constitute, in legal effect, the complaint. It is difficult to suggest any good reason why the respondent in such cases should not have the right to raise by demurrer, as well as by motion to quash, the question of the sufficiency of the facts alleged to require him to perform the duty di-

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rected to be done in the alternative writ, as the relator has to raise the question of the sufficiency of the answer by demurrer. The fact that the interposition of a demurrer to the petition and writ tends to delay the cause, which should be brought to a speedy conclusion, does not suggest a sufficient reason why demurrer should not be allowed to the petition and alternative writ, for such reason applies with equal force to a demurrer to the answer. The objection, however, to allowing an appeal from an order sustaining or overruling a demurrer in any case, which was not permissible prior to the enactment of Laws 1867, p. 111, c. 63, applies with special force to mandamus cases, but the difference is one of degree only. The rule announced in many adjudged cases in other jurisdictions is to the effect that the petition and alternative writ take the place of a complaint in an ordinary civil action, and if the facts alleged therein are not in substance legally sufficient the respondent may demur thereto. 13 Enc. Pl. & Pr. 702.

In the case of State v. McKellar, 92 Minn. 242, 99 N. W. 807, many of the decisions of this court were reviewed and the correct practice to bring before this court for review the decisions of the district court was indicated, but the question here in controversy was not directly decided.

In the case of State v. Peltier, 86 Minn. 181, 90 N. W. 375, the respondent demurred to the petition and alternative writ, the demurrer was overruled, and the respondent appealed from the order. The appeal was heard and determined on its merits, neither court nor counsel raising any question as to the right so to demur or as to the appealability of the order.

In the case of Gleason v. University of Minnesota, 104 Minn. 359, 116 N. W. 650, the respondent demurred to the petition and alternative writ and appealed from the order overruling it, and the appeal was determined on its merits, court and counsel assuming that the practice adopted was correct.

While we adhere to the view expressed in State v. McKellar, supra, that the approved and correct procedure to bring before the court for review the decision of the district court in mandamus cases is to appeal from the judgment or an order denying a motion for a

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new trial, yet we are not prepared to hold that it is exclusive of any other. We accordingly hold, following the cases cited, that the respondent may demur to the petition and alternative writ in mandamus cases.

The demurrer in this case was technically incorrect in that it was to the amended petition coupled with a motion to quash the writ. The demurrer, liberally construed, challenged the sufficiency of the facts stated in the petition and writ to entitle the relator to the relief demanded. The only question on the merits of the appeal is whether mandamus is sustainable on the facts alleged, which are, so far as here material, briefly these:

The Modern Woodmen of America is a fraternal beneficiary association organized under the laws of the state of Illinois, and is authorized to do business in this state. It has local lodges called camps, of which Hiawatha Camp No. 1931 is one, which is located in Minneapolis. It is not incorporated, and is composed of members of Modern Woodmen of America. The appellants Cook and Guffin are respectively consul and clerk of this local camp. In January, 1912, the supreme legislative or governing body of Modern Woodmen of America passed a resolution requiring members to pay higher insurance rates than they had theretofore been paying. The new rates are inequitable, unjust and higher than necessary. They were arbitrarily fixed, upon an unjust, unequal and prohibitive basis and place burdens upon the older members of the society, and, if enforced, will preclude them from keeping their benefit certificates in force, which will result in their forfeiture. Many members of the Modern Woodmen of America, many of whom are members of Hiawatha Camp No. 1931, being dissatisfied with the new rates, organized an association under the name of the National Modern Woodmen Assembly, for the purpose of carrying on a campaign of education and taking such legal steps as might be advisable to secure an annulment of the new and increased rates. On February 27, 1912, Hiawatha Camp No. 1931, at a regular meeting thereof, by a majority vote of the members present, adopted a resolution authorizing and directing the appropriation and payment from the general fund of Hiawatha Camp

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of the sum of fifty cents per capita on its four hundred seventy members to be used in support of such assembly in its work. The resolution also provided that there should be immediately paid out of the general fund of Hiawatha Camp, which it exclusively owned and controlled, the sum of $235 to the relator herein, who then was and now is the treasurer of such assembly. The by-laws prescribed for the government of the local camps of the Modern Woodmen of America, of which Hiawatha Camp No. 1931 is one, provided that the banker thereof shall receive all of its funds and disburse the same, when properly allowed, and by the camp ordered paid by virtue of orders which should be drawn by its clerk and signed by him and its consul. They further provided that the clerk and consul should sign all orders to be drawn on the banker. Prior to the institution of this proceeding the relator duly demanded of the appellant Guffin, as such clerk, that he draw and sign an order in favor of the relator for the sum so appropriated, and at the same time he also made due demand upon the appellant Cook, as consul, that he sign such order. Each of them wholly refused, and still refuses, to make out or sign or to deliver to this relator any order whatever.

Do these facts show that the relator has a clear legal right to have the duty, which he seeks to enforce by this proceeding, performed? The law of this state applicable to the question is that a writ of mandamus will issue only to compel the performance by an inferior tribunal, corporation, board, or person, of an act which the law specifically enjoins as a duty resulting from an office, trust, or station. Private domestic corporations and their officers are within this rule by virtue of the visitorial power of the state over them, but the writ does not lie to regulate the affairs of unincorporated societies or associations. R. L. 1905, § 4556; State v. Southern Minnesota R. Co. 18 Minn. 21 (40); State v. Ames, 31 Minn. 440, 18 N. W. 277; State v. Krahmer, 92 Minn. 397, 100 N. W. 105; State v. DeGroat, 109 Minn. 168, 123 N. W. 417; 26 Cyc. 139.

A careful consideration of the facts alleged in the petition and alternative writ has satisfied us that they do not bring the case within the rule stated, for they clearly show that the duty, sought to be en-

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forced by the writ, is not one which the law specifically enjoins, but one enjoined only by the by-laws of an unincorporated association. The fact that the Modern Woodmen of America is a foreign corporation, authorized to do business in this state, is not of any controlling force, for the fund upon which it is sought to have an order drawn in favor of the relator is exclusively owned and controlled by the unincorporated association. If the writ would lie to regulate the affairs of such an association, it could with equal reason be invoked to regulate the affairs of a copartnership. The case of Bassett v. Atwater, 65 Conn. 355, cited by the relator, does not support his contention, for in that case the respondents were officers of a domestic corporation and the duty sought to be enforced was one prescribed by a public statute.

We hold, upon the facts of this case, that mandamus will not lie, and that the trial court erred in overruling the demurrer.

Order reversed.

E. G. WALLINDER v. HARRY WEISS and Others.[1]

November 22, 1912.

Nos. 17,978—(152).

Statutory notice against mechanics' liens.

A lessor may, by posting or giving notice as required by section 3509, R. L. 1905, prevent mechanic's liens from attaching to his interest, although in the lease he has given the tenant permission to make the alterations for which the lien is claimed, the tenant having agreed to pay for the alterations and to restore the building to its former condition at the end of the term.

Action in the district court for St. Louis county to recover $72.82 and to foreclose a mechanic's lien for that amount upon certain

[1] Reported in 138 N. W. 417.

Note.—As to power of lessee or vendee generally to subject owner's interests to mechanics' liens, see note in 23 L.R.A.(N.S.) 601.

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premises. Defendants Breen and Shea in their answer admitted their ownership of the premises, but denied that the improvements or alterations were ever authorized by them, or made at their instance, and alleged that plaintiff had due and legal notice that the alterations or repairs were not authorized by them, that they had given the statutory notice required by posting the same, and further that the so-called improvements were of a temporary character and were of no benefit to the premises or to the owners. Defendant Pomeroy in his answer admitted that he was a bona fide mortgagee of the premises before and during the time of the transactions mentioned in the complaint, and prayed that the action be dismissed as to him. The case was tried before Dibell, J., who made findings and as conclusion of law ordered judgment in favor of defendants Breen, Shea and Pomeroy. Plaintiff's motion to amend the conclusions of law or grant a new trial was denied. From the judgment entered pursuant to the findings, plaintiff appealed. Affirmed.

John Jenswold, Jr., for appellant.

John Brown, for respondents.

HOLT, J.

The defendants Breen and Shea, owners of a building in West Duluth, made a lease thereof to defendant Weiss for three years to be used as a theater. In the lease privilege was given the tenant, at his own risk and expense, to remove and safely store the plate glass and other windows in the front of the building and the front doors, and to change and remodel the front of the building in such manner as may be reasonably necessary and desirable for theater purposes. There was also a stipulation that the tenant was to restore the front to its original condition at the end of the lease, that he should pay all bills for labor or material used in the building and keep it free from liens. The court found that before the beginning of the term of the lease Weiss entered upon the leased premises and commenced to make the changes, wherein plaintiff sold and furnished the required material. Within five days after knowledge that the work was being done, the owners posted and kept posted, in a conspicuous place on the premises, a notice to the effect that the im-

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provement was not being made at their instance. Plaintiff not being paid, filed a lien, and in this action to foreclose the same the court held that he acquired no lien upon the estate of the owners Breen and Shea in the building.

Plaintiff's position is that since the owners in the lease permitted the alteration to be made by the tenant, they authorized the improvement under the provision of section 3509, R. L. 1905, and hence cannot, by notice, prevent liens from attaching to their interest. Upon an examination of our mechanic's lien law, it will be found that the right to a lien is based on the proposition that the improvement was made pursuant to a contract with or at the instance of the one whose interest is to be charged with the lien. Prior to the passage of Laws 1889, p. 313, c. 200, it was necessary to prove that the one whose interest was sought to be affected by a lien had contracted for the improvement. O'Neil v. St. Olaf's School, 26 Minn. 329, 4 N. W. 47. In the last named act we find the remedy extended so that a lien may be had where the improvement was made "at the instance of the owner," or his agent, etc. Althen v. Tarbox, 48 Minn. 18, 50 N. W. 828. And it was provided that the presumption should prevail that the improvement was made at the instance of the owner, unless he kept posted or gave written notice to those furnishing material or performing labor that the work was not done at his instance, essentially in the same manner as now found. In construing this section 3509 of the Revised Laws, it is to be remembered that the main purpose in preparing and adopting the Code was to embody the then existing statutes into more compact and orderly form and clearer language. Said section 3509 covers sections 4 and 5 of said chapter 200, Laws 1889. The first part of the section relates to the vendor's interest in an executory contract to convey, and it is entirely clear that such interest may be protected by posting or serving the written notice mentioned unless the vendor has required the improvement to be made. Then follows the provision that every improvement shall be deemed authorized by the owner or parties interested, and that one who has not authorized the same may prevent a lien from attaching to his interest by posting a notice on the premises, within five days after knowledge of the improvement, that the

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same is not done at his instance. The act of 1889 clearly indicated that a lessor who did not contract for or direct the improvement to be made could, by giving or posting the notice, prevent his interest from being subjected to lien. Congdon v. Cook, 55 Minn. 1, 56 N. W. 253; Jefferson v. Leithauser, 60 Minn. 251, 62 N. W. 277.

But plaintiff insists that an intention is manifest in the Revised Laws to extend the scope of the mechanic's lien right so as to subject thereto the interest of the one who has merely given permission to the making of the improvement. It is said one who has given permission to make an improvement has authorized it under said section 3509. We consider this proposition unsound. The basis for the right to a mechanic's lien found in Laws 1889, p. 313, c. 200, § 1, is restated in the Revised Laws in section 3505, and it is plain therefrom that it is made to rest upon the ground already herein indicated, that the one whose interest is to be charged therewith has either contracted for the improvement, or else that it has been done at his instance. The only noticeable difference in the language is that in section 1 of the Laws of 1889, giving the lien right, occurs the phrase, "by virtue of a contract with, or at the instance of, the owner thereof, or his agent," etc., while in the Revised Laws the reading is, "whether under a contract with the owner of such real estate, or at the instance of any agent," etc., of such owner. There is here certainly no indication of an intent to broaden or extend the right to a lien. And in fact there is no change in meaning, for if something may be done at the instance of the principal's agent, it may also be done at the instance of the principal. The foundation of this right, as there indicated, must be kept in mind in giving the proper meaning to the word "authorized" as found in said section 3509: "When improvements are made by one person upon the land of another, all persons interested therein * * * shall be deemed to have authorized such improvements, in so far as to subject their interests to liens therefor. But any person who has not authorized the same may protect his interest from such liens" by the notice mentioned "that the improvement is not being made at his instance." We may assume for the purpose of this decision that, if the respondents authorized the alteration, notice that the same was not made

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at their instance will not prevent liens from attaching. But the word "authorized," as used in the section mentioned, is not synonymous with a permission or consent to an improvement made by a lessee or vendee for the latter's convenience. We think this appears when the purpose of the law as found in section 3505 and the whole mechanic's lien law, as it existed before the revision and is now found, is considered. A vendor may protect his interest by notice unless he has *required* the improvement to be made. The notice which serves to protect must state that the improvement is not made at the *instance* of the one who gives it. We take it that "authorized" here means authorized by contract with, or by direction, or at the instance of the owner or person interested, and not merely by his permission or consent at the instance of a tenant or vendee. Any other holding would work disastrous results to lessors or vendors who in many instances lease or sell with the understanding, express or implied, that the tenant or vendee, to enjoy the interest acquired, must necessarily make improvements or alterations. Such mere consent ought not irrevocably to subject the interest of the owner to mechanic's liens for work or material performed or furnished at the instance of a lessee or vendee. And we are of the opinion that the revision of the statutes made no radical change or departure in the mechanic's lien law as it existed prior thereto.

Therefore we hold that the defendant lessors herein, who merely consented to a temporary alteration by the tenant of the front of the building, by keeping the notice posted as provided by law that such alteration was not made at their instance, prevented plaintiff's lien from attaching to their interest.

The judgment is affirmed.

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JOSIE OPPENHEIM and Others v. FIREMAN'S FUND INSURANCE COMPANY.[1]

November 29, 1912.

Nos. 17,699—(37).

Fire insurance — coinsurance clause.

Where the coinsurance clause permitted by R. L. 1905, § 1642, as amended by Laws 1907, c. 446, is attached to a policy of fire insurance, and the insured maintains insurance on the building to the amount which he is by such clause required to carry, in case of a total loss the insurable value as stated in the policy, and not the actual value at the time of the fire, is the basis of determining the amount of recovery on the policy.

Total or partial loss.

In this case the question of whether the loss was total or partial was, under the evidence, one of fact for the jury.

Same — amount of recovery.

It is only where a loss on buildings is total that the insurable value as stated in the policy forms the basis of determining the amount of a recovery. Where the loss is partial the insured is entitled to recover the actual amount of his loss, and this cannot be based on the insurable value.

Reference to arbitrators.

If the actual loss is proved to be greater than the amount of the insurance, a reference to arbitrators is not a condition precedent to recovery, but if the actual loss is less than the amount of the insurance such reference is a condition precedent to recovery.

Action in the district court for Ramsey county to recover $5,000 upon a policy of fire insurance. The case was tried before Dickson, J., who, at the close of the testimony, denied defendant's motion for a directed verdict and directed a verdict in favor of plaintiffs for $5,142.50. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed and new trial granted.

Morphy, Ewing & Bradford, for appellant.

M. D. Munn, for respondents.

[1] Reported in 138 N. W. 777.

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PHILIP E. BROWN, J.

This is an action on a policy of fire insurance. At the close of the testimony the trial court directed a verdict for the plaintiffs. The defendant moved for judgment notwithstanding the verdict or for a new trial, and from an order denying this motion appealed to this court.

The policy sued on was issued upon a building in St. Paul owned by the plaintiffs, was for $5,000, and was one of six policies identical in form, making a total insurance of $20,000. While these policies were in force a fire occurred which damaged, or practically destroyed, the building. The plaintiffs furnished proofs of loss, claiming a total loss. The defendant insisted that the loss was not total, and demanded that the question of the amount of the loss and damages be referred to referees, as provided in the policy in case of a disagreement upon such question. The plaintiffs refused to comply with this demand and, the defendant refusing to pay, brought this action as for a total loss, and in their complaint alleged that the loss was total and prayed judgment for the total amount of the policy sued on, to wit: $5,000. The defendant, in its answer, admitted the issuance of the policy, that the insurable value of the property, as stated in the policy, was $25,000, and that the total insurance on the property was $20,000, but alleged that the entire risk covered by the policy amounted to more than $20,000, that the other companies carrying insurance on the said property were "co-insurers" with the defendant by reason of the fact that the policy contained the following so-called "coinsurance" clause:

"In consideration of the acceptance by the assured of a reduction from the established rate of 105 per cent to 89 per cent, it is hereby agreed that the assured shall maintain insurance during the life of this policy upon the property hereby insured to the extent of at least 80 per cent of the actual cash value thereof at the time of fire; and that failing so to do, the insured shall be a coinsurer to the extent of such deficit, and to that extent shall bear his, her or their proportion of any loss, and it is expressly agreed that in case there

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shall be more than one item or division in the form of this policy this clause shall apply to each and every item.

"This clause, at the request of the assured, is attached to and forms part of Policy No. C-118,167 of the Fireman's Fund Insurance Company of California, and shall in no case apply to dwellings or farm property nor to any risk wherein the total insurance shall be less than twenty thousand dollars, except grain elevators and warehouses and the contents of same."

As a further defense it was alleged that the loss was not total, but partial only, and that for this reason the reference demanded by it and refused by the plaintiffs was a condition precedent to the right to sue on the policy, and that the actual loss from the fire did not exceed $11,000.

1. The first proposition of the defendant is that by reason of the "coinsurance" clause of the policy and under R. L. 1905, § 1642, as amended by Laws 1907, p. 639, c. 446, the actual value of the insured property at the time of the fire is the basis for determining the amount of the loss, notwithstanding the agreed valuation of the property as evidenced by the "insurable value" stated in the policy. But the trial court ruled that the "coinsurance" clause, under the law referred to, had no effect; it being admitted that there was concurrent insurance which brought the total insurance up to eighty per cent of the insurable value stated in the policy; and in this we agree with the trial court. We hold that the mere attaching of the "coinsurance" clause to the policy, though with the consent of both parties to the contract, did not wipe out the "insurable value" stated in the policy and render the policy an open one, and that under such a clause the insurer becomes a coinsurer within the purview of Laws 1907, c. 446, only where he fails to take out concurrent insurance to the amount specified and required by such clause. The statute under consideration provides:

"Any policy where the entire risks covered by the same amounts to more than $20,000 may contain a coinsurance clause, if the insured requests the same in writing, of which fact such writing shall

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be the only evidence, and if, in consideration thereof, a reduction in the rate of premium is made by the company. When so demanded and attached to the policy, said agreement shall be binding upon both the insured and the company, and in case of loss the actual cash value of the property so insured at the time of the loss, including buildings, shall be the basis for determining the proper amount of such coinsurance and the amount of loss, notwithstanding any previous valuation of such building."

It appears that the insured in this case requested a coinsurance clause, and that pursuant to such request the clause above quoted was included in the policy. Looking, then, to this clause, it is quite clear that it was simply an agreement by the insured to maintain insurance on the property to the extent of at least eighty per cent of the "actual cash value thereof at the time of fire," in default of which the insured would themselves become coinsurers to the extent of the deficit. Since, therefore, it is admitted that the insured maintained insurance covering eighty per cent of the "insurable value," which amount, according to the defendant's own contention hereinafter referred to, even exceeded the amount which the plaintiffs were required to carry under a literal interpretation of that provision of the coinsurance clause specifying that eighty per cent of the "actual cash value" of the property "at the time of fire" should be covered by insurance, it would also seem very clear that the plaintiffs did not become coinsurers, and that, so far at least as the coinsurance clause is concerned, the policy was not an open one under which the loss was determinable with reference to the cash value of the property at the time of the loss, as distinguished from the "insurable value" stated in the policy.

There is a wide distinction between "coinsurance" and "concurrent insurance." The latter term has been used from time immemorial to designate insurance placed in other companies covering the same risk. The standard policy permits concurrent insurance, and it was permitted in the policy in this case. We venture to say that it is rare indeed that there is not concurrent insurance whenever the risk is a large one. Coinsurance, on the other hand, is a creature

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of modern invention, at least in this state. When the standard policy law was enacted, and for a long time thereafter, it was expressly provided that there should be no coinsurance or other clause in the policy which would reduce the amount payable to the insured in the event of loss to less than the amount of the loss, so long as there was insurance to cover the same. In 1903 a coinsurance clause was permitted at the option of the insured, where the total insurance was not less than $25,000 on one risk. Since then, while there has always been in the insurance laws a provision forbidding the insertion in a policy of a condition limiting the amount to be paid in case of a total loss on buildings to less than the amount of insurance on the same, a coinsurance clause has been permitted.

It is clearly the settled policy of the state to avoid controversy over the amount of a loss in case of a total loss on buildings. To adopt the rule contended for by the defendant would be to create this controversy in every case where the risk was over $20,000, and the coinsurance clause was attached, no matter whether the actual insurance maintained was under or over the amount which by the terms of the coinsurance clause the insured is required to carry. We hold that there is no "coinsurance" where the insured does not bear a proportion of the risk himself. When he procures concurrent insurance, and the total amount of all the policies on the property is equal to or greater than the amount which the insured agrees to carry, there is no "coinsurance," and the insurable value stated in the policy is the only basis for determining the amount to be paid in case of a total loss on buildings.

2. The second contention of the defendant is that this was a partial loss, and not a total one, and therefore that the insured is entitled to recover on the basis of the actual loss, which should be determined with reference to the actual value of the property at the time of the fire, as distinguished from the "insurable value" stated in the policy. The first question here is whether the loss was total or partial. An examination of the record leads us to the conclusion that the evidence on this point was conflicting and that the question was for the jury. Witnesses for the defendant testified that the walls of the building and certain iron posts, trusses, and joists, could

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be used in place in reconstruction. Witnesses for the plaintiff testified to the contrary. We are unable to say that it conclusively appears that the loss was total under the decision in Northwestern Mut. Life Ins. Co. v. Rochester German Ins. Co. 85 Minn. 48, 88 N. W. 265. For the purposes of this appeal, therefore, we must treat the loss as partial.

This brings us to the second question on this branch of the case, namely, whether in case of a partial loss the "insurable value" agreed upon in the policy is to be taken as the basis of determining the actual loss, or whether such loss must be calculated with reference to the actual value of the property at the time of the fire. The trial court, in directing a verdict for the plaintiffs, adopted the theory that the defendant was bound by the "insurable value" as stated in the policy, and that the amount of the actual loss should be determined by deducting from the insurable the value of the portion of the building which could be used in place in reconstructing the building. Upon this basis it was found that the result was a loss in excess of the total insurance on the building, and under the doctrine of Ohage v. Union Ins. Co. 82 Minn. 426, 85 N. W. 212, Moore v. Sun Fire Office, 100 Minn. 374, 111 N. W. 260, and Moore v. Phœnix Ins. Co. 100 Minn. 393, 111 N. W. 263, the defendant was held liable for the full amount of the policy sued on.

The defendant on the trial offered to prove that the total value of reconstructing the building was $20,500. This evidence was excluded on the theory that the defendant was bound by the insurable value stated in the policy, namely, $25,000. We must assume that, if this evidence had been admitted, it would have been shown that the amount of the actual loss was less than the total insurance, for it was found by the trial court that the value of the portion of the building remaining in place was nearly $5,000. Hence the correctness of this ruling whereby the above mentioned evidence was excluded, and of the order directing a verdict, depends wholly upon whether the amount of the insurer's liability is, in case of a partial loss, to be arrived at with reference to the insurable value, as stated in the policy, or by disregarding such value and looking to the actual value at the time of the fire.

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The valued policy provision of the statute contained in R. L. 1905, § 1642, as amended by Laws 1907, p. 639, c. 446, after providing that every company insuring any building shall cause its insurable value to be fixed and stated in the policy, declares that in the absence of change increasing risk, or of fraud, "the whole amount mentioned in the policy or renewal upon which the insurer receives a premium, shall be paid in case of total loss, and in case of partial loss, the full amount thereof." There can be no doubt that this language means that in case of a partial loss the full amount of such partial loss shall be paid. Before the revision, the language was: "And in case of a partial loss the full amount of the partial loss shall be paid." [1] It is plain that the revisers did not intend to change the law on this point, but only to eliminate what they considered to be superfluous words. It is quite evident, furthermore, from this statute, and from other provisions of the law and of the standard form of policy, (and a policy in such form must be construed as the voluntary contract of the parties, Kollitz v. Equitable Mut. Fire Ins. Co. 92 Minn. 234, 99 N. W. 892), that it was intended that in case of a total loss on buildings the recovery shall be on the basis of the insurable value as stated in the policy, but that in the case of a partial loss on buildings, or a total or partial loss on other property, the amount of the loss shall be recovered, without reference to the insurable value as stated in the policy.

For instance, the law as well as the policy provides that, except in case of a total loss on buildings, the amount of the loss shall be submitted to arbitrators, if not agreed upon. It is also provided, in the standard form of policy prescribed by the statute, that the amount of the loss or damage is to be estimated, except in the case of a total loss on buildings, "according to the actual value of the insured property at the time when such loss or damage happens;" and the standard form also provides that, except in case of total loss on buildings, the proofs of loss shall state the value of the property. Indeed we do not understand that it is directly contended by counsel for plaintiffs that the insurable value of the building as stated in the policy is to be used as a basis for determining the amount of the recovery where the loss is clearly not total. The basis of the plaintiff's con-

[1] [Laws 1895, p. 402, c. 175, § 25.]

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tention, and of the trial court's ruling, seems to be the rule announced in Ohage v. Union Ins. Co. supra, that where the loss is greater than the amount of total insurance, arbitration is not a condition precedent to recovery on the policy. But it is not said, either directly or by implication, in the Ohage case, that the insurable value stated in the policy is the basis for determining the amount of the loss, in case of a partial loss. It is said in that case that it was practically conceded that the loss was greater than the insurance, and therefore that a verdict was properly directed. The building insured in the Ohage case was totally destroyed except the foundation, and while not strictly speaking a total loss, yet it was total as far as the superstructure was concerned, and it was considered a useless thing to submit the amount of the damages to referees. In the present case, as we have said, it was seriously contended by the defendant, that the actual loss was considerably less than the insurance, and this it was not allowed to show. Had it appeared by the evidence here, or had it been conceded, that the actual loss was greater than the insurance, the rule of the Ohage case would apply. In Moore v. Sun Fire Office, supra, the complaint alleged a total loss, and also alleged the actual amount of the loss. The defendant denied both of these allegations, and denied all liability on the policy. It was held that the right of arbitration was waived, and also that, as it appeared conclusively that the amount of the loss exceeded the total amount of the insurance, therefore that no appraisal was required. That it was not held either in this case or the Ohage case that the insurable value controls in case of a partial loss is clearly apparent from the following language from the opinion, written by Mr. Justice Elliott:

"The statute provides for the recovery of the full amount of the valuation in case of total loss, and the amount of the damage in case of partial loss. In one case, the amount of recovery is determined by proof of the fact of the total destruction of the building, and in the other by proof of the actual amount of the damage."

To like effect is the language of Mr. Justice Lewis in North-

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western Mut. Life Ins. Co. v. Rochester German Ins. Co. 85 Minn. 48, at p. 53, 88 N. W. 265.

"If the loss occasioned by the fire was total, the stipulated value put an end to any inquiry as to the amount of the loss. The provision was adopted for the purpose of avoiding the uncertainty of determining the value after the fire. For the same purpose, a speedy method by means of arbitration is provided for determining the amount of damage in cases where the loss is only partial."

Our conclusion is that it was error to direct a verdict for the full amount of the policy. The question of whether the loss was total or partial should have been submitted to the jury, with instructions to return a verdict for the full amount of the policy in case the loss was found to be total, but if the loss was found to be partial, and less in amount than the total insurance, to return a verdict for the defendant. If the actual loss, though partial, was found to be greater than the amount of the insurance, however, the plaintiffs would be entitled to a verdict for the full amount of the policy under the rule in the Ohage case.

In determining the actual amount of a partial loss, the insurable value as stated in the policy should not be used as a basis, but the question should be decided upon the evidence before the jury that tends to prove what is the amount of the actual loss and damage sustained by the insured from the fire, the actual value of the building at the time of the fire, cost of reconstruction, cost of removing the débris, amount of salvage, all being proper subjects of inquiry.

Though the ruling is not involved on this appeal, we have some doubt whether the trial court ruled correctly in excluding the ordinance relating to the duties of the building inspector and the order of that official requiring the plaintiffs to take down the walls of the insured building after the fire. This question should be carefully considered on a new trial, in the light of the decision in Larkin v. Glens Falls Ins. Co. 80 Minn. 527, 83 N. W. 409. We do not decide it here, the record being insufficient to enable us to do so; nor

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do we intimate what our decision would be were the question before us.

Order reversed and new trial granted.

C. H. BURWELL v. E. S. GAYLORD.[1]

November 29, 1912.

Nos. 17,725—(52).

Complaint defective.

A complaint on a promissory note against an indorser, which fails to allege notice of dishonor, is demurrable.

Promissory note — liability of indorsing payee.

The legal obligation of an indorsing payee on a promissory note is that of indorser only, and cannot be considered, or proven to be, that of a maker.

Action in the municipal court of Minneapolis to recover $200 upon a promissory note. From an order, Montgomery, J., overruling defendant's demurrer to the complaint, he appealed. Reversed and remanded for further proceedings.

M. L. Fosseen and *W. A. McDowell,* for appellant.

Henry Deutsch, Breding & Fligelman and *Walter S. Whiton,* for respondent.

HOLT, J.

Suit on a promissory note. A demurrer to the complaint was overruled and defendant appeals.

The complaint alleges that one George W. Hale, on October 8, 1908, executed and delivered his promissory note whereby he promised to pay to the order of defendant herein $200 in six months from date, with interest. It is then alleged that before delivery of the note, defendant, for value, indorsed his name thereon for the pur-

[1] Reported in 138 N. W. 685.

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pose of giving credit thereto and inducing plaintiff to accept the same, and that plaintiff did accept and is the holder of the note. It is also alleged that at maturity the note was presented for payment and payment refused.

There is one fatal defect in the complaint in that it fails to allege notice of dishonor to defendant. Michaud v. Lagarde, 4 Minn. 21 (43) 8 Cyc. 126, and cases there cited. The pleading is evidently drawn in an attempt to make defendant, the payee named in the note, a maker. But under an unbroken line of decisions in this state, this may not be done. Levering & Morton v. Washington, 3 Minn. 227 (323); Barnard v. Gaslin, 23 Minn. 192; Coon v. Pruden, 25 Minn. 105; People's Bank v. Rockwood, 59 Minn. 420, 61 N. W. 457; Bowler v. Braun, 63 Minn. 32, 65 N. W. 124; and Porter v. Winona & Dakota Grain Co. 78 Minn. 210, 80 N. W. 965.

Barnard v. Gaslin, supra, approves the trial court's conclusion of law: "That the defendant, W. H. Gaslin, being the payee of the promissory note upon which this action is brought, his relation is such that he cannot, in law, be held to be the maker of such note, even though his endorsement was for the purpose of giving credit to the note."

In Coon v. Pruden, supra, where there was an attempt to prove that defendants intended to become makers by their endorsement, though named as payees, Chief Justice Gilfillan says: "The case is not analogous to those in which parol evidence has been admitted to show the character which a party, writing his name on the back of a note, intended to assume. That can be done only where such character is not shown by the writing itself, as where, at the time of making a note, a party other than the payee endorses it."

The defendant in the case before us is named as payee in the note, and when he placed his name on the back thereof his legal obligation became complete, clear and unambiguous to the effect that if the note, when due, was presented to the maker for payment and not paid, he, the defendant, would, upon due notice of dishonor, pay. In Dennis v. Jackson, 57 Minn. 286, 59 N. W. 198, an attempt was made to prove that one, not the payee, who wrote his name on

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the back of the note before delivery was an endorser and not a maker, but this court held it could not be done. The same reasoning forbids the payee endorser from being shown as maker. The rule established by the cited cases in this state obtains in other jurisdictions as appears from the following among others: First Nat. Bank v. Payne, 111 Mo. 291; Finley v. Green, 85 Ill. 535; Bigelow v. Colton, 13 Gray, 309; Dubois v. Mason, 127 Mass. 37.

The order overruling the demurrer to the complaint must therefor be reversed and the action remanded for further proceedings.

GEORGE SCHMEISSER v. JOHN A. ALBINSON.[1]

November 29, 1912.

Nos. 17,736—(72).

Fraud — verdict sustained by evidence.

In an action for damages on the ground that defendant had made false representations regarding the condition, soil and previous crop of a farm traded by defendant to plaintiff, *held* that the evidence sustains the verdict.

Charge to jury.

There was no error in an instruction to the jury that representations made to the wife of plaintiff would be the same as if made to the plaintiff, if they found that plaintiff was a man that listened to and was governed by his wife's directions, and that the defendant knew or had reason to believe such to be the situation.

Same.

In actions to recover damages for fraud and deceit, an instruction that plaintiff is entitled to recover upon establishing the cause alleged by a fair preponderance of the evidence *held* correct.

Evidence.

No prejudicial error appears in the rulings of the court on the reception or exclusion of testimony at the trial.

[1] Reported in 138 N. W. 775.

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Action in the district court for Nobles county to recover $4,500 damages for fraudulent representations in the exchange of farms. The facts are stated in the opinion. The answer alleged that, before the exchange was made, plaintiff went to defendant's land and carefully examined it and the buildings thereon. The reply was a denial of the new matter set up in the answer. The case was tried before Nelson, J., and a jury which returned a verdict in favor of plaintiff for $2,321.28. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, he appealed. Affirmed.

George W. Wilson and *E. H. Canfield,* for appellant.

J. A. Town, for respondent.

HOLT, J.

Action in deceit for damages resulting from misrepresentations as to the soil and condition of a farm traded to plaintiff by defendant. Defendant appeals from the order denying a new trial after verdict for plaintiff. The errors assigned here relate to the sufficiency of the evidence to support the verdict, to the charge of the court, and to rulings upon the admissibility of testimony.

Plaintiff, a farmer, owned and resided on a one hundred sixty acre farm in Nobles County, Minnesota. The defendant was in the real estate and lumber business at Worthington, Minnesota, and owned a three hundred twenty acre farm in Sherburne county. A mortgage of $2,500 was on plaintiff's farm, and one of $4,000 on defendant's. For some weeks prior to February 12, 1908, negotiations had been pending for an exchange, and during that time defendant took plaintiff to Sherburne county to see the farm. On the date mentioned the trade was made and the deeds delivered, subject to the stated mortgages.

The false representations alleged to have been made by defendant and on the strength of which plaintiff claims he traded farms, relate to the market value of the Sherburne county farm, its soil, its crop the year previous, and the condition of the buildings. The claim of the plaintiff was that defendant represented the farm to be of the value of $29.50 per acre, that the soil was black loam on a clay

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subsoil, that the one-third of the previous year's crop netted defendant $900, and that the buildings were in good repair. We may dismiss the misrepresentation as to the market value as being mere trade talk, for apparently that issue was not submitted to the jury. The evidence of plaintiff was to the effect that the farm was represented to be good farming land, that defendant the year previous realized $900 for his share of the crop, that the soil was black loam on a clay subsoil, or, as plaintiff expressed it, black clay soil, and that the buildings were in good condition. If these representations were made, there is no doubt that they were false in this respect; that the farm was run down so that only poor crops could be raised; that instead of receiving $900 for his one-third share of the crop the year previous, defendant received nothing and permitted the tenant to retain the insignificant crop then raised; that the soil, instead of being black clay, had scarcely a trace of clay anywhere and was a light sandy loam; and that the roofs of certain of the buildings were out of repair. Of course defendant's contention was that he never represented the soil other than sandy; said nothing about the previous crop, or the buildings, but that plaintiff examined carefully both buildings and soil, the ground being then bare, and after such examination made the deal. Plaintiff contended that there were some two or more inches of newly fallen snow when he got to the farm, so that the condition of the roofs of the buildings or the character of the soil could not be ascertained. He also says defendant supplied him with liquor on the way out to look at the farm, and when once there hurried him away.

A reading of the printed record gives the impression that plaintiff knows the English language imperfectly and is rather dull of comprehension; that his experience and mental capacity are such that he might readily fall a victim to the plausible and designing. At any rate, his wife, who ought to know him, seemed to entertain well-grounded fears on that score and so stated to defendant. Defendant, on the other hand, appears to have been an experienced business man, keen, alert, and coherent in his testimony, and apparently able to appreciate its effect on the issues involved. In any business deal he would undoubtedly have a great advantage over plaintiff, were he

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disposed to use it to plaintiff's loss. Notwithstanding that defendant's testimony appears plausible on the printed page, the jury found that of plaintiff and his wife the more credible. The trial court, who had the opportunity of observing the witnesses and their manner of testifying, considered the verdict righteous. We have read the record with care and find no valid reason for holding that the evidence fails to sustain the verdict by a fair preponderance.

It appeared that defendant talked over the proposed trade with both the plaintiff and his wife on more than one occasion before it was made. After the husband had been to see defendant's farm and before the deeds were passed, the wife saw defendant alone and stated that she was afraid the defendant would cheat or beat plaintiff, that defendant then said his land was good clay soil, and that if her husband "don't do that deal it is [her] fault because he got a chance to get a good deal." When asked to state all that was said she answered: "Well, I say 'if he do that deal we take it on your word, after your statement, and not on account of him being up there and look after the land, because there was snow on the ground, and if it is so good as you say we come up tomorrow and make the papers,' and Albinson say, 'you find it better than what I stated to you, and I am sure you will like yourself up there.' " The next day the deeds were exchanged.

Other parts of the evidence also contained suggestions that the wife was brighter and less confiding than her husband and probably was at the helm. The court in this respect said to the jury: "I instruct you upon that point that, if you find from the evidence that the plaintiff was a man that listened to and was governed by his wife's directions, and that the defendant knew or had reason to believe that, any statement made to the plaintiff [or] his wife, or to either of them, would be the same as if it had been made to the plaintiff." The defendant challenges this instruction as being without basis in the evidence. To us it seems otherwise. Apart from the momentous occasion to this husband and wife, trading off the farm which gave the family the only shelter and livelihood it had for another to serve the same purpose, it is but natural that both should take a keen and united interest therein and exert an influence

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upon each other. Add to that the manifest inequality of mental make-up between the wife and husband, and we fail to see wherein the instruction was not both appropriate and correct.

The defendant also assigns as error the refusal to instruct that the burden was on plaintiff to prove the alleged misrepresentations by clear and satisfactory evidence. The court did instruct thus on that proposition: "In determining these questions you are instructed that fraud is never presumed, but must always be proved by clear and satisfactory evidence. In this case the burden of proving the alleged fraudulent representations by a fair preponderance of evidence is upon the plaintiff. The evidence in support of the alleged fraudulent representations must outweigh the opposing evidence."

The rule is general that in actions to set aside and annul a written instrument on the ground that it was procured by fraud the evidence must be clear and strong. Jumiska v. Andrews, 87 Minn. 515, 92 N. W. 470; Dart v. Minnesota Loan & Trust Co. 74 Minn. 426, 77 N. W. 288; Oxford v. Nichols & Shepherd Co. 57 Minn. 206, 58 N. W. 865; Maxfield v. Schwartz, 45 Minn. 150, 47 N. W. 448; McCall v. Bushnell, 41 Minn. 37, 42 N. W. 545. But we think that in actions founded on fraud and deceit, where no formal written instrument is assailed, the rule is established in this state that a fair preponderance of the evidence will warrant a finding in favor of the litigant upon whom is the burden of proof. Of course the one accused of fraud and deception has always the benefit of the presumption of honest and fair conduct, so that his adversary, in order to prevail, must adduce testimony not only to bear down this presumption, but such other evidence as the one accused of fraud may offer in denial of the charge. That such is the holding of this court appears from Martin v. Hill, 41 Minn. 337, 43 N. W. 337, and in Berkey v. Judd, 22 Minn. 287, where it is said "that fraud is never to be presumed, but must be proved, yet this rule does not require direct, positive proof in all cases, but is satisfied if the facts and circumstances surrounding the alleged fraudulent transaction are such as reasonably point to the conclusion that a fraud was intended and actually perpetrated; and where such facts and circumstances exist, their force and effect in determining the question is a

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matter peculiarly within the province of the referee to settle and decide." Where the issue of fraud is submitted to a jury, it is within their province to draw conclusions from facts established by a fair preponderance of the evidence. That the profession understand that in ordinary actions for fraud and deceit a fair preponderance of the evidence establishing the charge is sufficient to warrant a recovery may be inferred from the fact that many cases have come to this court wherein instructions of that tenor have been given to the jury without objection, and 1 Dunnell, Minn. Dig. § 3839, states the law to the same effect. We see no reason to depart from this rule. Those bent on overreaching others by fraud and deceit usually are proficient in planning and carrying out the scheme so as to give the false representations the semblance of truth, and also to circumvent responsibility for the wrong. Clear and satisfactory evidence in such cases is, in the nature of things, almost impossible to produce, if we consider the versatility and unscrupulousness of one guilty of planned deceit to fabricate and present a plausible story on the witness stand. Stocks v. Scott, 188 Ill. 266, which defendant places reliance on, states the rule to be that fair preponderance of the evidence is all that is required to establish fraud. See also note to Lepley v. Andersen, 33 L.R.A.(N.S.) 836, where, on page 837, the cases holding the same as we, are cited.

The rulings on the introduction of evidence assigned as error we do not feel called upon to discuss, because counsel, neither in the brief nor in the oral argument, pointed out or suggested wherein error lay, and upon such examination as we have been able to give these rulings, we find none that appear wrong or prejudicial to defendant.

The order must therefore be affirmed.

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HARRY W. JONES v. RICHARD H. MAGOON and Another.[1]

November 29, 1912.

Nos. 17,756—(101).

Fraud — evidence.

In an action for fraud and deceit alleged to have been practised in an automobile exchange it is *held* that the evidence is sufficient to support the verdict, and that no reversible errors were committed on the trial of the action.

Fraud — pleading.

An allegation in the complaint that plaintiff relied upon and was induced by the representations to enter into the contract, is equivalent to an allegation that plaintiff "believed" the representations to be true, if such allegation be necessary in an action of this kind.

Action for damages.

An attempted rescission of the contract *held* not to bar an action for damages for the fraud.

Action in the district court for Hennepin county to recover $1,800 for fraudulent representations made in a sale of an electric automobile. The case was tried before Dickinson, J., who denied defendants' motions for a directed verdict, and a jury which returned a verdict in favor of plaintiff for $339.25. From an order denying defendants' motion for judgment notwithstanding the verdict or for a new trial, they appealed. Affirmed.

Wilson, Mercer, Swan, Ware & Stinchfield, for appellants.

S. B. Kay, for respondent.

Brown, J.

Action for fraud and deceit, in which plaintiff had a verdict and defendants appealed from an order denying their alternative motion for judgment or a new trial.

The short facts are as follows: Plaintiff purchased of defendants

[1] Reported in 138 N. W. 686.

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an electric motor car at the agreed price of $1,600. In payment of the car plaintiff paid to defendants $100, and turned over to them an automobile for which he was to receive credit to the amount of $1,450; the balance, or $50, was to be paid at a later day. Plaintiff alleged in his complaint that to induce him to enter into the transaction defendants falsely and fraudulently represented: (1) That the electric car was of the 1910 model and make; (2) that it had been run not to exceed two hundred miles; (3) that it would run a distance of fifty miles on a single charge of its batteries; (4) that it was equipped with "exide" batteries; and (5) that it was worth and of the value of $1,600. Plaintiff further alleged that he relied upon the representations so made and was induced thereby to purchase the car; and further that the representations were false and untrue and known by defendants to be false and untrue when made. Plaintiff also alleged that the car had as a matter of fact been run about two thousand miles, that it would not run to exceed twenty miles on a single charge of its batteries, that it was not equipped with "exide" batteries, and was worthless and of no value whatever. Defendants by their answer put in issue the allegations of fraud and deceit, and interposed counterclaims for the balance due on the purchase price of the car, and for a small amount due for services rendered to plaintiff subsequent to the bargain and sale. The counterclaims were not disputed, and the aggregate amount thereof was allowed by the jury and deducted from plaintiff's recovery.

The trial below centered around the question whether defendants falsely represented the condition of the motor car in the respects heretofore stated, and, as submitted to the jury, the issues in this particular were confined to the extent the car had been used, whether it would run fifty miles on a single charge of its batteries, and whether it was equipped with "exide" batteries. The jury by their verdict found for plaintiff upon those questions. It is the contention of defendants that the verdict is not supported by the evidence, and further, even though sufficient to support a finding of false representations, that the evidence wholly fails to show any diminution in the value of the car in consequence or because of the fact that the representations were not true. Whether this contention be sound

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presents the principal question on this appeal. Other points are made by defendants which will be referred to later, but the main claim is that the evidence fails to make a case for recovery of damages.

1. Our examination of the record discloses sufficient evidence to support the verdict. Defendants were dealers in automobiles and motor cars, and had been for some time prior to the transaction in question. The particular electric car had been in their possession for six months or more, and was used by them during that time for demonstration purposes. They were familiar with the car and necessarily knew at least to what extent it had been used by them and whether it would run a distance of fifty miles on a single charge of its batteries. They also knew whether the car was equipped with "exide" batteries. Though there was a conflict in the evidence upon the question whether defendants made the representations alleged, the record sustains the finding of the jury that they were made, and also that they were false and untrue.

There was also ample evidence that the car was in fact worth substantially less than the contract price, and the amount awarded to plaintiff was within the limits fixed by the witnesses. The principal question upon this branch of the case is whether the value of the car, as testified to by the plaintiff's witnesses, was shown to be affected by the fact that it had been run in the neighborhood of sixteen hundred miles, that it was not equipped with "exide" batteries, and would not run to exceed thirty miles on a single charge of its batteries. It is contended by defendants that the opinion of plaintiff's witnesses as to the value of the car was not shown to have been based upon the condition of the car in the respect stated, and, therefore, that the alleged false representations were not shown to be the cause of plaintiff's loss. The evidence upon this phase of the case is not entirely clear or satisfactory, but we deem it sufficient to support the verdict. Taking the testimony of witness Lunt as a whole, the jury were justified in concluding that his estimate of the value of the car was based, in part at least, upon the fact that it had been used for demonstrating purposes and had been run about sixteen hundred miles, and the further fact that it would not run to exceed

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thirty miles on a single charge of its batteries. Such is the natural inference from his testimony taken as a whole. He was familiar with the car, had examined it to some extent, and knew the general market value of similar cars. In fixing his value he took into consideration the "whole mechanism of the car," the fact that it had been used for demonstrative purposes, and would not run to exceed thirty miles on one charge of its batteries. Though the usual question in cases of this kind, namely, what was the value of the car in its actual condition, having reference to the defects complained of, was not put to any of the witnesses, yet we conclude that the testimony, at least of this particular witness, was in the main founded upon that inquiry, and sufficiently supports the verdict.

2. On the trial of the action the court required plaintiff to elect whether to proceed on the theory that the contract had been rescinded for the alleged fraud, or for damages resulting from the fraud. Plaintiff elected to proceed on the theory of damages for the alleged fraud, and the trial was so conducted. It was brought out on cross-examination of plaintiff that before the commencement of the action he offered to return the car to defendants, and demanded the return of his automobile and the money paid at the time of the transaction. It is contended that this constituted a rescission of the contract, and that plaintiff cannot recover for the false representations; that his only remedy is an action for the return of the property he parted with. We do not sustain this claim. Defendants refused to accept a return of the car, or to surrender to plaintiff the automobile, or repay the $100 paid them when the trade was made. Plaintiff retained the car, and subsequently disposed of it. The evidence shows only an attempted rescission. Plaintiff's offer to rescind did not operate to deprive him of the remedy for damages, since the attempt did not become effective.

3. Several other questions raised by defendants may be disposed of without separate discussion. It is claimed that the complaint is fatally defective, since it contains no allegation that plaintiff "believed the misrepresentations" alleged to have been made by defendants. The objection is not well taken. While such allegation is often made in pleadings in actions of this kind, we think it unnecessary in

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the case at bar; the equivalent is found in the allegations that plaintiff relied upon the representations and was induced thereby to enter into the contract. Again the question was not raised until the time of trial, and was properly overruled.

The court charged the jury that the measure of damages was the difference between the value of the car in its actual condition and the value thereof had it been as represented. This was technical error. The measure of damages was the difference between the actual value of the car and the contract price. Mountain v. Day, 91 Minn. 249, 97 N. W. 883. But the error of the court was not a matter of substance, was clearly an inadvertence and attention should have been called thereto by counsel. Mountain v. Day, supra.

There was no error in submitting to the jury the question whether the car was equipped with "exide" batteries. There was evidence tending to support the claim that it was not, and the court rightly left the issue to the jury.

This covers all that need be said. We have considered all the assignments of error and discover no grounds or reasons justifying a new trial of the action.

Order affirmed.

GEORGE GEE v. GREAT NORTHERN RAILWAY COMPANY.[1]

November 29, 1912.

Nos. 17,795—(107).

Verdict sustained by evidence.

In this, a personal injury action, it is *held* that the evidence sustains the verdict, and that there was no error in the instructions to the jury.

Action in the district court for Yellow Medicine county to recover $10,000 for an assault and injuries received by being thrown

[1] Reported in 138 N. W. 684.

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from a moving freight train. The answer alleged that plaintiff, with other men, without a ticket, jumped upon a train while it was in motion and assaulted defendant's brakeman, who thereupon defended himself and pushed plaintiff from the train while it was moving slowly; that plaintiff immediately jumped upon the train and assaulted the brakemen a second time and while defending themselves one of the brakemen fell from the train a second time. The reply was a general denial. The case was tried before Powers, J., and a jury which returned a verdict in favor of plaintiff for $1,000. From an order denying defendant's motion for a new trial, it appealed. Affirmed.

Winsor & Keith, M. L. Countryman and *W. L. Clift,* for appellant.

Bert O. Loe and *Daly & Barnard,* for respondent.

BUNN, J.

This is an action to recover for personal injuries received by plaintiff in being pushed from a flat car on which he was riding, by brakemen in defendant's employ. Plaintiff had a verdict for $1,000. Defendant appeals from an order refusing a new trial.

The questions here are as to the sufficiency of the evidence to sustain the verdict and as to alleged errors in the charge.

Plaintiff, a gentleman of color, with two companions, boarded a flat car in a freight train of defendant as it was leaving the station of Cottonwood. Their story is that a brakeman demanded money of plaintiff, and upon his pleading inability to pay, shoved him from the car. Plaintiff caught on a box car two cars in the rear, walked over the tops of the intervening cars, and came down the ladder to the flat car. He claimed that he was returning to recover his hat. He and one of the brakemen grappled, and in the altercation both fell from the car. It was the claim of plaintiff's witnesses that the brakeman was the aggressor, that plaintiff was only bent on recovering his hat, and not looking for trouble. Defendant, in its answer, claimed the plaintiff assaulted the brakeman, but we find little, if any, evidence to sustain this claim. A careful reading of the evidence convinces us that the verdict has such support that we cannot

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say that it was an abuse of discretion to deny a new trial. We are not impressed with the probability of the story told by plaintiff and his companion who testified; they were clearly trespassers, and some degree of force was justified on the part of the brakeman. But the evidence is such that the question was clearly for the jury, and we find no ground upon which we can logically disturb the verdict, after the trial court has approved it.

It was not error to instruct the jury that the duty of defendant applied to both instances when plaintiff went off the car. The claim that plaintiff's cause of action was based alone on the second encounter with the brakeman is not sustained by an examination of the complaint.

It is urged that it was error to ignore in the instructions the issue of assault and self-defense raised by the answer. It is doubtful if there was any evidence that would warrant the submission of this issue to the jury. The trial court did instruct the jury: "But, if you find on the other hand that it was merely an accident, or that he was not so injured by the wrongful act or acts of the defendant, you would find a verdict in favor of the defendant." No exception was taken to the charge at the trial, and there was no request for an instruction submitting the question of self-defense. If defendant was not satisfied with the instruction above quoted, it was its duty to request a more specific one, or at least to call the attention of the trial court to any inaccuracy or insufficiency in the instruction given.

Order affirmed.

HOLT, J., (dissenting).

I dissent. Plaintiff was violating two criminal statutes the second time he boarded defendant's train (Sections 5026 and 5178, R. L. 1905). He passed over two box cars to reach the brakeman who had just pushed him off the flat car. The two grappled, and in the struggle both fell from the moving train. There is nothing to show that this outcome was intended by the brakeman. It seems to me that there should be no recovery, in view of plaintiff's deliberate violation of the law, unless the brakeman acted in wanton disregard of plaintiff's rights, and this the evidence fails to show.

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EDWARD W. BENEKE v. ESTATE OF SOPHIA M. BENEKE.[1]

November 29, 1912.

Nos. 17,804—(151).

Parent and child — claim against estate of parent.

Evidence upon an application by a son for the allowance of a claim against his deceased mother's estate for board, services, etc. (such services being held to have been rendered her while she was living with him as a member of his family) considered, and *held*, to sustain the trial court's finding that the estate was not liable for such claim.

Presumption.

The execution of a promissory note gives rise to a rebuttable presumption that the payee was not at the time of such transaction indebted to the maker.

From an order of the district court for Olmsted county, which denied his motion for a new trial and for an amendment of the findings, Snow, J., Edward W. Beneke appealed. Affirmed.

Thomas Spillane and *M. D. Halloran*, for appellant.

Charles C. Willson and *Henry O. Christensen*, for respondent.

Philip E. Brown, J.

Sophia M. Beneke died testate in Olmsted county on November 24, 1910, aged eighty-three years. After the appointment and qualification of an executrix of her estate, her son, this appellant, filed a claim against the same amounting to the sum of $1,830, in the probate court, for the value of board, room, light, and washing, alleged to have been furnished the decedent by him while she was residing with him and his family, in his home, during nearly all of the last six years of her life, including therein also an item for the value of the board of a nurse for his mother, alleged to have been furnished

[1] Reported in 138 N. W. 689.

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for her in his home during her last illness. The executrix interposed an answer denying the son's claims in toto and presented to the court by way of offset thereto the amount of the principal and interest of three promissory notes, the principal of which aggregated $1,160, executed by the claimant to the deceased in her lifetime. The probate court, after a hearing, denied the son's claim and allowed the offset. The claimant appealed to the district court, where, a jury being waived, a trial was had to the court, and findings were filed affirming the action of the probate court. Thereafter the claimant moved for a new trial, and, as a part of his application, included therein a demand to the effect that, in the event of the denial of his motion, the court amend its findings in specified particulars, which demand would, if granted, necessarily have resulted in the allowance of the appellant's claim. The court denied this motion in all respects, and this is an appeal from its order in such regard.

The evidence adduced on the trial established and the court found, among other things, in effect, that the services specified in the claimant's demand were in fact furnished by him as claimed and were of the value stated. Furthermore it appears, and was found, that the claimant rendered all of these services while the deceased resided in his dwelling house as a member of his family under no express agreement on her part to pay therefor, and that she never definitely promised to pay him for the same. The court also found the evidentiary facts concerning the business and domestic relations of the deceased and the claimant at great length, and by its conclusions of law denied him any relief. Likewise, under the uncontroverted testimony the findings established the execution of the three notes interposed by the executrix by way of offset as above stated, and their nonpayment, all as claimed by the executrix.

The appellant makes no claim that there was any express agreement on the part of the deceased to pay for these services, but insists, substantially, that the trial court erred in finding that the deceased lived with the claimant as a member of his family, and also erred in refusing to find substantially as follows: "It appears from the evidence that there was a mutual understanding between said Sophia, and said Edward, that the services rendered, and the accom-

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modations furnished were not to be rendered and furnished gratuitously, and that said Sophia expected and intended to pay for the same, and that said Edward expected to be paid therefor, and that said services rendered and the accommodations furnished to said Sophia by said Edward, were rendered and furnished under circumstances from which an obligation to pay for the same is justly inferred."

The case turns on the determination of the above stated contentions, other points covered by the assignments of error either having been waived by failure to argue them, or else being such as to require no comment. The appellant makes no real complaint concerning the facts found, but rests his objections on the deductions drawn by the court from the facts, and the questions thus presented are, whether the deceased was a member of the claimant's family at the time the services were rendered; and, if so, could the trial court reasonably infer from the proofs that pecuniary compensation was contemplated by the parties therefor at the time when the services were rendered.

The fair determination of these questions requires a recital of the salient features of the findings, all of which we hold to be supported by the evidence. Such in effect are that, after the death of the husband of the deceased in 1895, she, in settlement of certain matters growing out of his will, conveyed to the claimant all of her interest in the estate of her deceased husband, and the claimant, in turn, conveyed to her a life estate in eighty acres of land, the parties agreeing that the claimant should use the land during his mother's life and pay her therefor as rent the sum of $160 per year, payable annually, and $400 in addition thereto, and the claimant further covenanted that she should have the use of three rooms in the building situate on the eighty, and also be furnished by him with what was "necessary for her use which can be raised on the farm, viz.: flour, meat, potatoes, milk, eggs and vegetables, also the necessary fire-wood, cut and ready for the stove," during her lifetime. The claimant complied with his covenants and agreements literally, up to the time he left the farm, except that his mother accepted from him a note for $400, in lieu of the payment above mentioned. The parties lived

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on the farm in the same house, until about nine years prior to the death of the mother, when she and the claimant and his family, consisting of his wife and children, moved to Rochester, where the mother thereafter lived with the son as a member of the family up to the time of her death. Until the last two years of her life, she participated in the work of the household, but then ceased because of a serious affliction which incapacitated her for labor and necessitated increased care, attention, and nursing on the part of the claimant and his family. With the exception of the special attention made necessary by her disease, however, she received no more rewards than he had agreed to furnish her on the farm. During the period she resided with him in Rochester she paid the bills of her physician, the major part of the compensation of her nurses, and a part of the wages of the house servants. She also paid for her clothing and articles for her personal use, and at one time contributed $100 towards the payment for a sewer connection for the son's residence, in order that her own conveniences would thereby be increased. During her lifetime, her son, the claimant, made no demand on her for payment for any of the services rendered, and continued to pay her the stipulated rent for the eighty-acre farm when it matured. She never paid him anything on account of services rendered. It also appeared that the claimant executed notes to her as follows: November 3, 1901, $160, payable on demand, with six per cent interest; November 1, 1906, $500, payable on demand, with five per cent interest; November 1, 1907, $500, payable on demand, with five per cent interest. No part of these notes has been paid, except that all of the interest accruing thereon was paid annually up to November, 1910. The claimant testified that he expected payment to be made for the items stated in his account. There was, also, evidence of declarations of the deceased made on several occasions during the last years of her life, but not to the claimant or in his presence, to the effect that she would pay the claimant for all that was done for her, and that she did not expect them, the family, to "do it" for nothing, and that claimant would get his pay for all done for her.

Such being the facts before us, we think that it is too clear for argument, that the deceased was a member of the claimant's family

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during the period of the rendition of the services in question; and, such being the case, the only remaining question is whether the court ought to have amended the findings as requested. While the case of Einolf v. Thomson, 95 Minn. 230, 103 N. W. 1026, 104 N. W. 290, 547, is not precisely in point here, the rule there stated, supported, as it is, by Donahue v. Donahue, 53 Minn. 460, 55 N. W. 602, and Wetherill v. Canney, 62 Minn. 341, 346, 64 N. W. 818, governed the trial court in its consideration of this case, which rule is as follows:

"The general rule deducible from the authorities is that, where a child after arriving at majority continues to reside as a member of the family with a parent, or with one who stands in the relation of a parent * * * the presumption is that no payment is expected for services rendered or support furnished by the one to the other. This presumption is not, however, conclusive, and may be overcome by proof either of an express agreement to pay, or of such facts and circumstances as show satisfactorily that both parties at the time expected payment to be made," citing 21 Am. & Eng. Enc. (2d ed.) 1061. See also Hodge v. Hodge (Wash.) 11 L. R. A.(N.S.) 873 to 913, and Hardman's Admr. v. Crich (131 Ky. 358), 133 Am. St. 248, where the cases are collated, and in the notes to the latter case the rationale of the rule is discussed.

The appellant insists that it appears that the dealings of his mother and himself were "at arm's length, a mere matter of dollars and cents," and that both parties expected payment to be made for the services involved, and furthermore that any presumption to the contrary growing out of the relationship of parent and child was destroyed by the evidence of the facts and circumstances. But we do not consider the proofs sufficient to establish the appellant's contentions in this regard, nor to give rise to an implied contract between the members of a family to pay for services, which can be established only by evidence sufficient to warrant the deduction that payment was contemplated by both parties when the services were rendered. This conclusion is reinforced by a consideration of the facts recited as to the claimant's payment of the annual rents on the eighty-acre farm, and especially as to the execution by him of notes payable to

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his mother for large sums, and his payment of annual interest thereon. Why should he pay rents and execute notes to her when she was indebted to him in large amounts? It seems to us that such actions are inconsistent with the claimant's theory that the parties should be considered as dealing at arm's length in the matter of the services rendered. True it is, that such facts are not conclusive against the claimant. His explanation of why he paid such interest, namely, because it was due to his mother, and because he figured that he had money enough in his possession to pay him what she owed him, that is, that he owed her enough money on his notes to nearly cover her indebtedness for his services, is not, however, convincing. Moreover, such conduct on the part of the claimant raised a presumption against him, for it is well established by the authorities that the execution of a note by one person to another gives rise to a presumption that the payee was not at the time of such transaction indebted to the maker. Barnes v. Green's Admr. 11 Ky. L. Rep. 422, 12 S. W. 277; McIntyre v. Meldrim, 63 Ga. 58; Downs v. Downs (Iowa) 102 N. W. 431; Fitzpatrick v. Phelan, 58 Wis. 251, 16 N. W. 606; Atchison v. Davidson, 2 Pinney, 48.

We have not overlooked the testimony of the several witnesses who testified to the deceased's declarations concerning her intention to pay for the services rendered by the claimant, or that he would be paid. Such declarations are, however, too ambiguous and equivocal to establish liability. Nor are they sufficient to rebut the presumption, above referred to, arising from the execution of notes by the claimant to the deceased and payments made by him to her. They might as well have referred to his expectancy as his mother's heir at law, as to anything else. It would be mere guess work to conclude therefrom that the deceased intended to pay for the services in question.

Finally, while the principle announced in Einolf v. Thomson, supra, must be applied here to the same extent as in the trial court, we are required to apply in connection therewith also the familiar rule of appellate procedure, which, stated most favorably for the appel-

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lant, is that we cannot disturb the findings of the trial court if the evidence fairly tends to support them. This rule applied here necessarily requires an affirmance.

Order affirmed.

JOHN P. GALBRAITH v. J. L. WHITAKER and Another.[1]

November 29, 1912.

Nos. 17,808—(102).

Bankruptcy — preference.

Under section 60, subdivisions a and b of the Bankruptcy Act, as amended, where an insolvent debtor procures or suffers a judgment to be entered against himself within four months before the filing of the petition in bankruptcy, and the judgment then operates as a preference, the preference is not voidable by the trustee, unless it appears that the creditor at the time the judgment was entered had reasonable cause to believe that the enforcement of the judgment would effect a preference.

Avoiding transfer by insolvent.

Where, under the same sections, an insolvent debtor makes a transfer of any of his property, and the effect is a preference of any creditor, such preference is voidable by the trustee and the amount thereof may be recovered, if it appears that the creditor receiving the preference had, at the time of the transfer, reasonable cause to believe that such transfer would effect a preference.

Sale on execution equivalent to transfer of property.

Where a creditor procures a judgment against an insolvent debtor, and thereafter procures execution thereon to be issued and levied on personal property of the debtor, and at the execution sale such property is sold and the proceeds of the sale paid to the creditor in satisfaction of the debt, it is held that such execution sale and payment of the proceeds thereof constitutes a transfer of his property by the debtor, within the meaning of those words as used in the act.

Creditor put upon inquiry.

In determining whether the creditor had reasonable cause to believe a transfer by the debtor would effect a preference, facts which are sufficient

[1] Reported in 138 N. W. 772.

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to put an ordinarily prudent man upon inquiry as to his debtor's solvency charge such person with all the knowledge he could have acquired by the exercise of reasonable diligence.

Evidence.

The evidence did not conclusively show that defendants, at the time of a transfer by their insolvent debtor of his property, had reasonable cause to believe that such transfer would effect a preference.

Action by the trustee in bankruptcy of the Washington County Co-operative Company to recover $400, the value of property belonging to the insolvent which defendants levied on and sold upon execution, the same constituting a preference in favor of defendants, an unlawful preference alleged to have been paid defendants. The case was tried before Dickson, J., and a jury which returned a verdict in favor of defendants. From an order denying plaintiff's motion for judgment notwithstanding the verdict or for a new trial, he appealed. Reversed and new trial granted.

A. E. Boyesen and H. H. Flor, for appellant.

T. P. McNamara, for respondents.

BUNN, J.

This action was brought by plaintiff as trustee in bankruptcy of the Washington County Co-operative Company to recover an unlawful preference alleged to have been received by defendants. The issues were tried and submitted to a jury, which returned a verdict in favor of defendants. Plaintiff appeals from an order denying his motion for judgment notwithstanding the verdict or for a new trial.

The assignments of error raise the questions of whether the trial court erred in refusing to direct a verdict for plaintiff, or in its instructions to the jury, and whether the verdict is sustained by the evidence.

The uncontroverted facts are as follows:

Defendants are in the commission business in St. Paul, and sold merchandise to the Washington County Co-operative Company on credit. This corporation was engaged in the retail business at Stillwater. On August 22, 1911, being unable to pay its debts, it exe-

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cuted an assignment of all its property for the benefit of creditors to John P. Galbraith. On August 8, 1911, defendants commenced an action in the Stillwater municipal court against the co-operative company to recover the sum of $220.60, the amount of their claim for merchandise sold. An answer was interposed, and a trial resulted in a judgment against the co-operative company in the full amount of the claim. The judgment was entered September 16, 1911. Execution was issued on the judgment, and levied on September 19, 1911, on certain personal property in the possession of the assignee, which was, on October 3, 1911, sold on the execution sale for $254.70. This amount was applied by the sheriff to pay defendant's judgment and costs.

On September 20, 1911, one day after the levy, and two weeks before the execution sale, other creditors of the co-operative company filed a petition against it for adjudication in bankruptcy. On October 6, 1911, the company was adjudicated bankrupt. Plaintiff was appointed and qualified as trustee.

Plaintiff's claim is that defendants had reasonable cause to believe, at the date the judgment was entered and at the date of the levy and sale on execution, that the company was insolvent, and that the judgment and the sale constituted a preference which is voidable by the trustee under section 60, subdivisions a and b, of the bankruptcy act.[1] This section is as follows:

Sec. 60, Subd. a. "A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the

[1] [U. S. Comp. St. Supp. 1911, 1506. See 30 St. 562; 32 St. 799; 36 St. 842.]

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recording or registering of the transfer, if by law such recording or registering is required."

Subd. b. "If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent, and the judgment or transfer then operate as a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property *or its value* from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

From this section it is seen that a preference is recoverable by a trustee when the following elements exist:

1. The insolvency of the debtor.

2. A preference obtained within four months prior to the filing of the petition in bankruptcy.

3. The debtor has suffered or procured a judgment to be entered against himself, or has made a transfer of any of his property, which operates as a preference.

4. The person receiving such preference, or to be benefited thereby, or his agent acting therein, has reasonable cause to believe that the enforcement of such judgment or transfer will effect a preference.

That the debtor was insolvent at the time the judgment was entered, and at all times thereafter, was established. That a preference was obtained by defendants within four months prior to the filing of the petition is also clear. The trial court held that the debtor had suffered or procured a judgment to be entered against itself, and that

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the only issue for the jury was as to whether defendants had, at the time the judgment was entered, reasonable cause to believe that the enforcement of the judgment would effect a preference. The case was submitted to the jury on this theory. Plaintiff contends that the execution sale and payment of the proceeds to the creditor constituted a "transfer," within the meaning of that term as used in the section quoted, and that if defendants at the time of such sale, had reasonable cause to believe that such transfer would effect a preference, plaintiff is entitled to recover the amount thereof in this action.

If the trial court was correct in holding that the debtor had "suffered or procured" this judgment to be entered, and if there was no "transfer" by the debtor of his property, it was probably correct to instruct the jury that it must be shown that defendants, at the time the judgment was entered, had reasonable cause to believe the enforcement of the judgment would create a preference. The law is somewhat blind on this point. It says in substance: If at the time of the transfer, or of the entry of judgment, the bankrupt be insolvent, and the judgment or transfer *then* operate as a preference, and the person receiving it, or to be benefited thereby, shall *then* have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable, etc. The word "then" apparently refers to the time the judgment was entered. It would seem that a creditor may enforce a judgment entered at a time when he has not cause to believe the debtor is insolvent, though at the time he enforces it he has such cause to believe, or has actual knowledge that the enforcement of his judgment will give him a preference. But this may have been the intention of the act. It is only judgments which the debtor "suffers or procures" to be entered that are condemned by the law. As to other judgments, or as to judgments entered when the creditor has not reasonable cause to believe the debtor is insolvent, there is no preference by their enforcement that is voidable, unless it can be held that a sale of the debtor's property on an execution under any such judgment, and the payment to the creditor of his claim out of the proceeds of such sale, constitutes a transfer of his property by the debtor. If it can be so held, it is clear under the terms of the act that if the creditor has, at

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the time of such transfer, reasonable cause to believe that it will effect a preference, the trustee may recover the amount thereof. The importance of this question in the case at bar, is clear, because of the evidence of facts which came to the knowledge of defendants after the judgment was entered and before the execution sale.

The law deals with transfers by the insolvent of his property, as well as with judgments suffered or procured to be entered against him. A judgment is not a lien on personal property of the debtor. It is only the enforcement of such judgment that can possibly create a preference. The mere entry of the judgment cannot. Then, as before stated, judgments against the insolvent which he does not "suffer or procure" to be entered are not within the act. These considerations are helpful in determining the intent of Congress in using the word "transfer." The law seems inefficient to accomplish the result clearly intended, the prevention of preferences, unless it can be held that a sale on execution of personal property of the insolvent and the payment from the proceeds of the creditor's claim, is a "transfer." That there is a "transfer" of property when it is sold and delivered to a purchaser at the sale, or when the proceeds of the sale are turned over to the creditor, is quite apparent. The property sold is transferred to the purchaser; the proceeds of the sale are transferred to the creditor. Prior to the sale, the property belongs to the debtor; after the sale the proceeds belong to the debtor, until the sheriff pays therefrom the creditor's claim. They then belong to the creditor. Strictly speaking the transfer is not made by the debtor; it is not his voluntary act. But the word "transfer," as used in the act, has a wide meaning. It is defined in the act itself as follows:[1] "'Transfer' shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." It has been held that the words "as a payment, pledge, mortgage, gift or security" are illustrative only, and do not qualify the language "sale and every other mode of disposing of or parting with property." In re Stege, 116 Fed. 342. The Supreme Court of the United States, in Pirie v. Chicago Title

[1] [U. S. Comp. St. 1901, 3420. See 30 St. 545.]

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& Trust Co. 182 U. S. 438, 45 L. ed. 1171, in discussing the above definition of a transfer, said, at page 444: "All technicality and narrowness of meaning is precluded. The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished,—a preference enabling a creditor 'to obtain a greater percentage of his debt than any other creditors of the same class.'" It seems entirely reasonable to say, and we hold, that the sale on execution and payment of the proceeds to the creditor was a means and manner by which property passed from the ownership and possession of the debtor, and that it constituted a transfer from and by the debtor of his property within the meaning of the act, as construed in the cases cited. Any other holding would permit just what the act is designed to prevent, a preference of one creditor over the others. A judgment could be procured at a time when the creditor has no reason to believe the debtor is insolvent. And then, when the creditor learns of the insolvency of his debtor, and of threatened bankruptcy proceedings, or the actual institution of such proceedings, he may collect his claim, without fear of an action to recover the amount of the preference so obtained. We cannot believe that this result was ever intended.

In view of this conclusion, it is clear that the case was submitted to the jury under an erroneous theory, and under wrong instructions on the pivotal question at issue. Exceptions were taken to the instructions given, and to the refusal to give requested instructions which stated the law as we hold it to be. There must, therefore, be a new trial.

We are asked to order judgment in favor of plaintiff, on the ground that the evidence conclusively shows that defendants, at the time of the execution sale, had reasonable cause to believe it would effect a preference. The evidence tending to show reasonable grounds for such belief on the part of defendants is to our minds quite persuasive. The rule is that facts which are sufficient to put an ordinarily prudent man upon inquiry as to his debtor's solvency, charge such person, when they come to his notice, with all the knowledge

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he could have acquired by the exercise of reasonable diligence. McElvain v. Hardesty, 169 Fed. 31. Defendants found it necessary to bring suit against their debtor, a customer in active business, to collect an indebtedness incurred in the ordinary course of business; to procure a judgment and enforce it by execution. Their Mr. Whitaker admits that he was asked by Mr. Bristol and Mr. Rodgers, acting for plaintiff, at the time or shortly after the judgment was entered, not to levy execution, and was told that if they did "execute the judgment," bankruptcy proceedings would be begun. Mr. Whitaker communicated this threat to his attorney in Stillwater, but took no steps to ascertain if the insolvency necessary to justify bankruptcy proceedings in fact existed. The petition in bankruptcy was filed one day after the levy, and two weeks before the sale. It is strange indeed if St. Paul creditors of the debtor proceeded against did not learn of the filing of the petition. There was evidence, however, which perhaps would justify submitting this question to the jury. On the whole we do not think it is a case where judgment absolute should be ordered.

Order reversed and new trial granted.

JOHN McLAUGHLIN v. CLOQUET TIE & POST COMPANY.[1]

November 29, 1912.

Nos. 17,834—(100).

Negligence — questions for jury.

The defendant intrusted to its employees the work of driving lumber products down a stream and through the land of the plaintiff. The work, during its progress, was interfered with by a stump in the stream at a point near the plaintiff's house. The foreman and a driver, another employee, then went into the stream and sawed out the obstruction and in doing so both were wet. The driver, upon reaching the shore, built a fire on the bank of the

[1] Reported in 138 N. W. 434.

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stream on plaintiff's land for the purpose of drying his clothes. He negligently failed to put the fire out, whereby the plaintiff sustained damages.

Held, upon a consideration of the whole evidence, that the question whether the act of the driver in setting the fire was in the course of and within the scope of his employment, was one of fact for the jury, and that the court did not err in refusing to direct a verdict for the defendant.

Action in the district court for St. Louis county to recover $1,305 for the destruction of certain pulp-wood, fencing and standing timber. The case was tried before Cant, J., who denied defendant's motion for a directed verdict, and a jury which returned a verdict in favor of plaintiff for $740. Defendant's motion for judgment notwithstanding the verdict was denied and its motion for a new trial was granted, unless plaintiff consented to a reduction of the verdict to $500. From the judgment, entered after such consent had been given, defendant appealed. Affirmed.

William B. Phelps, for appellant.

John F. Wilkie and *Alexander Marshall*, for respondent.

START, C. J.

This action was brought in the district court of the county of St. Louis to recover damages in the sum of $1,000, alleged to have been sustained by the plaintiff by the negligence of the defendant, by its employee, in negligently starting and leaving a fire which burnt and destroyed certain pulp-wood, poles, and standing timber on the plaintiff's land. The defense was in effect a denial of the allegations of the complaint. A verdict was returned for the plaintiff for $740. The defendant made an alternative motion for judgment in its favor notwithstanding the verdict, or a new trial in case the motion for judgment should be denied, and assigned four separate errors in support of the motion for a new trial. The court made its order denying the motion for judgment and granting the motion for a new trial, unless the plaintiff consented to a reduction of the verdict to $500. He consented, and judgment was entered upon the verdict as reduced, from which the defendant appealed, and here assigns that the court erred as follows:

"1. In refusing to direct a verdict in favor of the defendant.

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"2. In refusing to give the fifth instruction requested by defendant.

"3. In refusing to order judgment in favor of defendant notwithstanding the verdict.

"4. In refusing to grant defendant a new trial of this action."

The last assignment of error is too general to present any questions for our consideration, as the motion for a new trial was made on more than one ground. 1 Dunnell, Minn. Dig. § 363.

The other assignments of error raise the question whether, upon the whole record, the trial court erred in not instructing the jury to return a verdict for the defendant and in not ordering judgment in its favor notwithstanding the verdict. In making this statement we have not overlooked the second assignment of error, which is based on the refusal of the court to instruct the jury that: "If you find that the driver who started this fire, as claimed by the plaintiff, built the fire to dry his clothing, your verdict will be for the defendant." It was not error to refuse this request, unless the defendant was entitled to an instructed verdict, for the jury was specifically instructed that, to entitle the plaintiff to recover it was not sufficient that the fire was set by defendant's employee, but that they must be satisfied that the fire was set by the employee in the line of his employment and in the scope of his agency, and not for a purpose personal to himself.

This leaves for our consideration the question: Was the defendant, upon the whole evidence, entitled to a directed verdict in its favor? The evidence relevant to this question tends to prove the following facts:

The plaintiff is the owner of the land described in his complaint, through which runs a natural stream. He was in possession of the land in 1909 upon which there were then standing timber and several piles of pulp-wood and poles, some of them near the bank of the stream. The defendant, during the summer of 1909, was engaged in driving lumber products down the stream and through the land of the plaintiff. It entrusted the execution of this work to its

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employees. The driving operations incident to such work were interfered with by a stump in the stream at a point near the plaintiff's house. The plaintiff at this time was absent from his land, but it was in charge of his nephew, Ray McLaughlin, of whom the defendant's foreman, in charge of the work, borrowed a saw with which to cut out the obstruction in the stream. The foreman, and another employee of the defendant, a driver, then waded into the stream and sawed out the obstruction, and in doing so both were more or less wet. They then went ashore and the foreman started down stream, but the driver said to McLaughlin: "I will have to build a fire to dry my clothes;" to which McLaughlin made no reply and started toward the house, when the driver called to him that he had forgotten the saw. He then turned around to get the saw and noticed that the driver had started a fire, but said nothing about it as he thought the driver would put it out. He then went to the house; and some twenty minutes thereafter he heard a roar and discovered that the fire had not been put out but had spread and was beyond control. The fire so started by the driver and negligently left burning destroyed the plaintiff's pulp-wood and fence poles and injured to some extent his standing timber.

The controlling question upon the record is whether the trial court erred in not directing a verdict for the defendant on the ground that, as a matter of fact, the setting of the fire by the driver was not done in the course of and within the scope of his employment; or, in other words, whether as a matter of law there was no evidence fairly tending to show that his act was so done. The settled rule of this court, stated abstractly, is to the effect that a master is only liable for the wrongful act of his servant when it is done in the course of and within the scope of his employment. The application of the rule is shown in the cases following: Morier v. St. Paul, M. & M. Ry. Co. 31 Minn. 351, 17 N. W. 952; Mulvehill v. Bates, 31 Minn. 364, 17 N. W. 959; Smith v. Munch, 65 Minn. 256, 68 N. W. 19; Slater v. Advance Thresher Co. 97 Minn. 305, 107 N. W. 133; Barrett v. Minneapolis, St. P. & S. Ste. M. Ry. Co. 106 Minn. 51, 117 N. W. 1047; Kwiechen v. Holmes & Hallowell Co. 106 Minn. 148, 156,

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118 N. W. 668; Penas v. Chicago, M. & St. P. Ry. Co. 112 Minn. 203, 127 N. W. 926.

While the abstract rule is well settled, some confusion has arisen in applying it concretely, especially with reference to the meaning of the term "the course of and within the scope of his employment." No hard and fast definition of the term, applicable to all cases, can be given. Some of the earlier cases in this court seemingly applied the rule with literal exactness, but the tendency of the later cases is to give the rule a more liberal and practical application, especially in cases where the business of the master intrusted to his servants involved a duty owed by him to the public or third persons. See in this connection the exhaustive opinion of Justice Jaggard in Penas v. Chicago, M. & St. P. Ry. Co. supra.

The defendant relies upon the Morier case as conclusively controlling the instant case. The facts in the Morier case were, that the employees of the defendant were engaged in repairing its railroad track and were charged with no duty outside of it. They usually went to their boarding house for their dinners, but on the day in question they brought their dinners with them, and at noon left their work, went upon the right of way and built the fire, which destroyed plaintiff's property, for the purpose of warming their coffee. These special facts distinguish that case from the one at bar. In this case the execution of the work intrusted by the defendant to its employees required them to pass over the plaintiff's land along the banks of the stream, and the defendant owed to the plaintiff the duty of exercising due care to prevent injury to the plaintiff's land in the course of the work assigned to its employees. The building of the fire by the driver to dry his clothes was not, as a matter of law, a departure from the course of his employment, for it was incidently connected therewith, and was made necessary by his going into the stream to remove the obstruction, which was a part of the work assigned to him.

Upon a consideration of the entire record, we have reached the conclusion that the question, whether the driver set the fire in the course of and within the scope of his authority, was one of fact to be decided by the jury under proper instructions. We accordingly

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hold that the trial court did not err in denying defendant's motion for an instructed verdict in its favor or its motion for judgment. The evidence does not leave the question of the defendant's liability a mere matter of speculation; nor does it show that the plaintiff is estopped from asserting any claim against the defendant by reason of anything that his agent in charge of the premises said or failed to say or do.

Judgment affirmed.

MERCHANTS & MINERS STATE BANK OF HIBBING v. ARCHIBALD M. CHISHOLM.[1]

November 29, 1912.

Nos. 17,853—(186).

Complaint construed.

Complaint construed and *held* to state a cause of action to recover damages which resulted from alleged fraudulent and illegal acts of defendant in procuring a loan from plaintiff to be made to an insolvent borrower for defendant's purposes.

Action in the district court for St. Louis county to recover $6,000. From an order, Dancer, J., overruling defendant's demurrer to the complaint, he appealed. Affirmed.

Francis W. Sullivan, for appellant.

Theo. Hollister and *J. A. P. Neal,* for respondent.

BUNN, J.

This is an appeal from an order overruling a general demurrer to the complaint, which, after alleging the corporate character and business of plaintiff, is substantially as follows:

On and prior to March 5, 1906, John F. Killorin was president, L. G. Sicard, cashier, defendant and P. H. Nelson, directors of

[1] Reported in 138 N. W. 682.

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plaintiff. The capital stock of plaintiff bank was $25,000, its surplus $10,000. On March 3, 1906, the president and cashier were absent from Hibbing, where the bank was located, which fact was well known to defendant. On this date N. E. La Mond was assistant cashier, and the only person in charge of the affairs of the bank through whom its funds could be obtained. On March 3, 1906, defendant wrote and caused to be delivered to La Mond, the following letter:

"Dear Sir:

"Enclosed I hand you note of Daniel Waite for $6,000, secured by certificates Nos. 13 and 14 of Blake & Waite Company, which Mr. Nelson arranged to let him have $6,000 on. Will you kindly mail me two drafts, one for $4,000, and one for $2,000 for same, and oblige

"Yours truly,
"A. M. Chisholm."

La Mond was about to sever his connection with plaintiff, and become the private secretary of defendant, by reason of which fact, and the relations existing between defendant and La Mond, defendant had great influence over La Mond, and could and did induce him to make and mail the two drafts asked for in the letter, which drafts were made payable to Daniel Waite, indorsed by him, and paid by plaintiff. The note of Waite was delivered to La Mond for plaintiff, at the time of the delivery of the letter. Said sum of $6,000 has never been paid, nor has any part thereof, nor the interest thereon, except the interest to December 6, 1907. The statement in the letter that Nelson had arranged to let Waite have $6,000 was false and fraudulent, and made by defendant solely for the purpose of inducing La Mond to deliver the funds of the bank to Waite, and defendant on said date knew that Waite was not entitled to a loan from plaintiff in the sum of $6,000 or any other sum. Waite was then and still is financially irresponsible. At the time defendant procured the loan aforesaid to be made to said Waite, he contemplated the purchase of stock in a corporation known as the Blake-

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Waite Company, and that defendant used his influence and the statements contained in the letter to procure the said loan to be made to said Daniel Waite "in his own interest, and indirectly to himself." Said loan was not acted upon by the board of directors of plaintiff, or by any officer of said bank except defendant, and was procured by defendant in violation of section 2989, R. L. 1905. Defendant well knew that neither the president, cashier, nor any director of plaintiff, other than himself, would sanction the loan; that he chose a time and opportunity when all the other officers of the bank were absent, to and did exert his influence upon La Mond to procure the funds aforesaid from the bank. It is also alleged that the loan was in violation of section 2993, R. L. 1905; that the sum was in excess of the amount which the bank had any right to loan to any person; that the said loan so procured by defendant to the said Waite was a fraud upon plaintiff. It is then alleged "that by reason of the unlawful and fraudulent conduct and acts of the said defendant, plaintiff has been damaged in the sum of $6,000, with interest thereon from the 6th day of December, 1907." A demand for judgment in such sum follows.

If this complaint, by a liberal construction of its allegations, states a cause of action, either in tort or on contract, the demurrer was properly overruled. The trial court held that, if the complaint was to be construed as attempting to set up a cause of action for a loss resulting to the bank from a loan to Waite, an insolvent borrower, a demurrer would lie, for the reason that there is no sufficient allegation that the bank suffered any loss or damage. The complaint was construed, however, as alleging a loan indirectly made to defendant himself, and held to show an absolute liability on the part of defendant for the amount of the loan.

We are not disposed to disagree with the conclusion of the trial court that a cause of action on contract can be spelled out, but it seems quite apparent, considering all the allegations of the complaint, that the intention of the pleader was to state a cause of action sounding in tort, to recover damages resulting from the fraud and illegal acts of defendant in procuring the loan to be made to Waite. We imagine this to be the case which plaintiff will attempt to prove

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in the event the complaint is sustained, and therefore deem it of importance to the parties to dispose of this question.

It cannot be doubted that the allegations are ample to show fraud, and violation of the statutes on the part of defendant. But if plaintiff was not damaged by the procuring of the loan to Waite, of course it has no cause of action against the wrongdoer. The note was given and the loan made March 3, 1906. Interest was paid to December 6, 1907, but not thereafter. This action was commenced in March, 1912. It may fairly be assumed that the note was long past due, and that plaintiff was unable to collect either principal or interest from the maker. The chief ground of defendant's contention that a cause of action is not stated, is that it does not appear from the complaint that the stock certificates, referred to in the letter of defendant as securing the note of Waite inclosed, were worthless, or that they were not worth the full amount of the note. But the complaint does not allege that those certificates were ever delivered to or held by the bank as security for the note. The letter does not say they were inclosed, nor does it state the par or any other value of the stock. There seems no ground for assuming either that the bank holds the collateral, or that if it does, it is of any value. The allegation that plaintiff has been damaged in the sum of $6,000 by the fraudulent and unlawful acts of defendant pleaded, while not, standing alone, a sufficient allegation of damages, must be construed with the other allegations referred to. We think, considering the complaint as a whole, that it sufficiently alleges that plaintiff has lost the $6,000 which defendant, by fraud and in violation of the statutes, procured, for his own purposes, to be loaned to an insolvent borrower.

We cannot hold that it conclusively appears from the complaint that plaintiff is precluded by the long delay, or by receiving interest on the note, from maintaining an action for damages for the fraud. Plaintiff is not seeking to rescind a contract procured by fraud. The complaint does not show such an affirmance or ratification of the transaction as estops plaintiff from now claiming that the loan was procured by fraud or in violation of the statute.

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We hold that the complaint, liberally construed as it should be, states a cause of action, and that the demurrer was properly overruled.

Order affirmed.

FIRST NATIONAL BANK OF BENSON v. PATRICK S. GALLAGHER and Another.[1]

November 29, 1912.

Nos. 17,863—(106).

Parol agreement to discharge mortgagor — statute of frauds.

The mortgagor in a mortgage of real property, the mortgage being a mere incident to the debt or obligation secured, may be released and discharged from his personal liability for the payment of the debt by a subsequent parol agreement with the mortgagee founded upon a valuable consideration; and such an agreement is not in violation of the statute of frauds.

Same — Evidence.

An agreement in parol to release the mortgagor from his personal liability must be established by clear and convincing evidence, for the effect thereof is to set aside the written contract.

Action in the district court for Swift county to recover $971.79, deficiency after foreclosure of a mortgage. The defense is stated in the opinion. The case was tried before Qvale, J., who directed a verdict in favor of plaintiff for $1,020.84. From an order granting defendants' motion for a new trial, plaintiff appealed. Affirmed.

E. L. Thornton, for appellant.

John I. Davis, for respondents.

Brown, J.

On March 1, 1906, defendants, husband and wife, made and delivered to plaintiff their promissory note for the sum of $2,500,

[1] Reported in 138 N. W. 681.

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payable in five years, as and for a loan of that sum then made to them by the bank. To secure the payment of the note defendants executed a mortgage upon real property owned by the husband. Default was made in the payment of the debt and the mortgage was duly foreclosed, plaintiff becoming the purchaser at the sale. The amount bid for the property at the sale was $2,500, and there remained then due upon the mortgage, principal and unpaid interest, the sum of $971.79. This action was brought to recover the deficiency. Defendants interposed in defense that on August 15, 1907, long before the mortgage indebtedness became due, the parties entered into a parol agreement by which, for the consideration of $180, then paid to plaintiff in the form of a promissory note executed by defendants, plaintiff agreed to release and discharge defendants from personal liability for the payment of the indebtedness, and to look only to the mortgaged property, which defendants allege was then worth $3,500. In performance of the agreement, defendants then made and delivered to plaintiff their promissory note for the amount stated. On the trial, evidence tending to establish this defense was received over plaintiff's objection, but was subsequently stricken out on motion, and a verdict directed for plaintiff for the amount claimed. Thereafter, on defendants' motion for a new trial, the court concluded that in striking out the evidence error was committed and a new trial was granted. Plaintiff appealed.

It is the contention of plaintiff that the alleged contract or agreement releasing defendants from their personal liability, conceding it to have been entered into as claimed, was void and unenforceable because not in writing; that it was in violation of the statute of frauds, since it modified by parol the terms of the mortgage, required by statute to be and which was in writing. Whether this contention be sound presents the only substantial question on this appeal.

1. It is no doubt elementary that a contract, required by the statute of frauds to be in writing and executed in a particular manner, can only be changed or modified subsequent to its execution by a writing of equal solemnity duly signed and executed by the parties, except perhaps in cases where the doctrine of equitable estoppel applies. But the rule has no application to the facts in the case at

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bar. The effect of the agreement here involved was to discharge the personal liability of the mortgagors and was not a modification of the terms of the mortgage. In the case of a mortgage securing the payment of a promissory note, or other specified indebtedness, the debt secured is the principal obligation, the mortgage a mere incident thereto. The assignment of the debt carries with it the mortgage, and the payment of the debt, as between the parties, extinguishes the lien of the mortgage. If the verbal agreement in the case at bar had been for the payment of two thousand dollars, in full discharge of the secured indebtedness, there can be no question, as between the mortgagors and the mortgagee, that the mortgage would have been ipso facto satisfied, the agreement and payment being made before the debt became due. Schweider v. Lang, 29 Minn. 254, 13 N. W. 33. Nor can there be any serious question of the right of the parties to stipulate and contract, subsequent to the execution of the mortgage, for the release of either the security or the personal liability of the mortgagor. Donnelly v. Simonton, 13 Minn. 278 (301). And since such an agreement, at least as respects a release of the personal liability of the mortgagor, operates as a discharge and not as a modification of the mortgage, we are clear that a parol agreement is perfectly valid when founded upon a new and independent valuable consideration.

That such an agreement is valid and enforceable is maintained by many of the courts. Wallis v. Long, 16 Ala. 738; Carpenter v. Murphree, 49 Ala. 84; Ryan v. Dunlap, 17 Ill. 40, 63 Am. Dec. 334; Ackla v. Ackla, 6 Pa. St. 228; Brooks v. Jones, 114 Iowa, 385, 82 N. W. 434; Huff v. Farwell, 67 Iowa, 298, 25 N. W. 252; Leddell v. Starr, 20 N. J. Eq. 274; Southerin v. Mendum, 5 N. H. 420; Howard v. Gresham, 27 Ga. 347; 2 Pingrey, Mortgages, 1166; 27 Cyc. 1418. The rule is otherwise in Maine and Massachusetts, where it is held that a parol release is void under the statute of frauds. Leavitt v. Pratt, 53 Me. 147. The decisions of those states are evidently based upon the theory that the mortgage is the principal contract or obligation, the debt the incident. The converse of the proposition is the law of this and the other states whose decisions are here cited. The question would seem to be disposed of in this state by the decision in Schweider v. Lang, supra. That case involved a

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verbal agreement, by which the payee of a promissory note, which was secured by a real estate mortgage, agreed to accept in full payment a sum less than the face of the obligation, and upon such payment to release and discharge the mortgage. The agreement was entered into before the maturity of the note. The court held the agreement valid and not within the statute of frauds. See also Wiley v. Dean, 67 Minn. 62, 69 N. W. 629. Of course the rights of third persons can only be affected by a discharge of the mortgage of record in the manner pointed out by law. But a formal written discharge is not necessary to the validity of an agreement made for that purpose between the mortgagor and mortgagee, where the rights of third persons are not involved.

We therefore hold that the agreement in the case at bar to release defendants from personal liability was valid and not within the statute of frauds. The further suggestion that the agreement was not to be performed within a year and for that reason void is not sound. The agreement was not executory. On the contrary, when defendants paid the consideration the transaction was completed and became a fully executed contract.

2. The further contention that the evidence is not sufficient to support a verdict or finding that the contract was entered into as claimed by defendants cannot be considered. While it is true that a contract of the kind should be made to appear by clear and convincing evidence (Stevenson v. Adams, 50 Mo. 475), for the effect is to set aside the written contract, and though the evidence presented on the trial below, and subsequently stricken out, is not at all satisfactory, still the question is one of fact, and should be first passed upon by the trial court. The court below in striking out the evidence did not intend, as we understand the record, to pass upon the sufficiency or insufficiency of the evidence. On the contrary, the court proceeded on the theory that the contract or agreement was invalid, since it was not in writing. The question must therefore be deemed an open one and go back for trial.

Order affirmed.

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SIVERT SIVERTSON v. CITY OF MOORHEAD.[1]

November 29, 1912.

Nos. 17,914—(70).

Evidence — new trial.

In this, a personal injury action, it is *held* that no reversible errors were made in the admission of evidence or in the instructions to the jury, nor did the trial court abuse its discretion in denying plaintiff's motion for a new trial on the ground that the verdict was not justified by the evidence, and also on the ground of newly discovered evidence.

Action in the district court for Clay county to recover $15,350 for personal injuries. The answer alleged that the uses to which the engine and pump were being put were casual and temporary and did not require or justify the purchase of a new and expensive engine and boiler; that defendant purchased a second hand engine and boiler which were adapted to the work required and were entirely safe and steam worthy; that some of the packing used in and about the flanges had become somewhat dry and permitted steam to leak or escape in small quantities from the boiler chamber, but this condition in no wise rendered the boiler unsafe or liable to explode or liable to endanger the safety of persons working in its immediate vicinity; that while plaintiff was passing near or about the boiler, a small amount of steam escaped by reason of the condition heretofore alluded to, causing a hissing sound, and that thereupon plaintiff, without due cause, without exercising any judgment or intelligence, started to rush stupidly and blindly away from the boiler, without regard to obstacles or impediments, and that if injuries were thereby inflicted upon him they were solely the result of his contact with obstacles encountered during his precipitate flight and were caused by his negligence. The reply was a general denial. The case was tried before Nye, J., and a jury which returned a verdict in favor of

[1] Reported in 138 N. W. 674.

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defendant. From an order denying plaintiff's motion for a new trial, he appealed. Affirmed.

Peterson & Adams and *McEnroe & Wood,* for appellant.

Morton Barrows and *Garfield H. Rustad,* for respondent.

START, C. J.

On May 8, 1911, the defendant city was maintaining and operating an artesian well to supply water for the residents of the city and for public purposes. The plaintiff was then an employee of the city as a common laborer in and about such enterprise. This is an action to recover for personal injuries claimed to have been sustained by the plaintiff while engaged in such work. He alleged in his complaint that the defendant negligently furnished for such work an old, defective and dangerous steam boiler, and that by reason thereof the packing was blown therefrom and the steam escaped with such force, without warning to him, that he was seriously injured thereby. These allegations were put in issue by the answer and the issues submitted to the jury. A verdict was returned for the defendant. The plaintiff made a motion for a new trial on the grounds of error of law occurring at the trial, newly discovered evidence, and that the verdict was not justified by the evidence. The motion was denied and the plaintiff appealed from the order denying it.

1. The first group of alleged errors assigned relates to the rulings of the trial court as to the admission of evidence. The defendant's superintendent of its water and light department, who purchased the boiler in question, was permitted, over the plaintiff's objection, to testify, after answering certain preliminary questions, as follows:

"I asked Mr. Sykes, the man whom I purchased the boiler of, if the boiler was safe, and he said he had subjected it to a test of one hundred eighty pounds hydraulic pressure, and he brought his man and he said the same thing, and I took his word for it, as he is an old boilermaker."

It is urged by plaintiff that this ruling was erroneous for the reason that it was not competent to relieve the defendant from responsi-

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bility for failing to have the boiler inspected as required by statute, R. L. 1905, § 2172, by hearsay evidence of what some one said about a test applied to it. This must be conceded, as an abstract proposition, but it does not appear from the record that the evidence was offered or received for any such purpose. Precisely why it was offered is not clear from the record, and we assume for the purposes of this appeal that the evidence was immaterial. The trial court, however, in this connection, instructed the jury to the effect following:

Under the laws of this state it was the duty of defendant, before operating or raising steam in the boiler, to have it inspected by a duly appointed boiler inspector of this state. Therefore, if you find that defendant's failure to have this boiler inspected, as required by law, was in any way responsible for the accident complained of, then defendant would be liable in this action for such injuries as the plaintiff has shown himself to have sustained as a direct result of such failure.

The attention of the jury, by this instruction, was specifically directed to the necessity of an inspection by a duly appointed inspector of this state, and by necessary implication excluded any other inspection or test as a substitute therefor. It is clear, therefore, that the admission of the evidence complained of was not reversible error.

2. The next group of alleged errors relates to the instruction of the trial court in submitting to the jury the question of the causal connection between the alleged negligence of the defendant and the injury of the plaintiff. The specific claim is, that the court erred in using in this connection the word "direct" instead of the word "proximate." No exception was taken at the trial to this instruction, or any other, nor was the court requested to make it more specific. The word "proximate," for the want of a better one, is usually used by courts to designate the legal cause of an injury, but the word "proximate" when so used is synonymous with "direct" and "immediate." Nelson v. Chicago, M. & St. P. Ry. Co. 30 Minn. 74, 77, 14 N. W. 360; Renner v. Canfield, 36 Minn. 90, 92, 30 N. W. 435; Ermentrout v. Girard F. & M. Ins. Co. 63 Minn. 305, 308, 65 N. W. 635.

The instruction was legally correct, and if there was any reason

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to apprehend that the jury might be misled by the use of the word "direct" instead of "proximate" it was the duty of counsel to call the matter to the attention of the court and ask for a more specific instruction.

Several other alleged errors of the trial court in its instructions, and in failing to give instructions upon its own motion, none of which was requested, are here urged as a ground for reversal. We find no reversible error in the instructions as given, nor did the court err in not giving instructions not requested.

3. The last contention of the plaintiff to be considered is to the effect that the trial court erred in denying his motion for a new trial on the ground that the verdict was "contrary to the evidence," and also on the ground of newly discovered evidence. A consideration of the evidence and the affidavits as to the alleged newly discovered evidence, has led us to the conclusion that the question whether the plaintiff was injured as a result of the defendant's negligence was one of fact to be determined by the jury, and further, that the newly discovered evidence was largely impeaching, which is not a ground for a new trial except in extraordinary cases, which this is not, and that the court did not abuse its discretion in denying the motion for a new trial on either of the grounds urged.

Order affirmed.

WILLIAM D. JOHNSON v. JOHN H. SCOTT.[1]

November 29, 1912.

Nos. 17,915—(75).

Submission of issue to jury.

Where the complaint in an action for injuries alleged to have been caused

[1] Reported in 138 N. W. 694.

Note.—As to duty of pedestrian to look out for auto cars, see notes in 3 L.R.A.(N.S.) 345; 20 L.R.A.(N.S.) 232.

For reciprocal duty of operator of automobile and pedestrian to use care, see note in 38 L.R.A.(N.S.) 487.

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by the defendant's negligence, failed to allege "wilful negligence," but such issue was litigated by the parties and it was manifest that the defendant was not misled, there was no reversible error in submitting such issue to the jury; provided, of course, the evidence was sufficient to authorize such submission, especially where no exception on this account was taken on the trial.

Quære — pleading and proof.

Quære, whether "wilful negligence" is provable under an allegation of ordinary negligence.

Evidence.

Evidence considered and *held* sufficient to authorize submission of an issue of "wilful negligence."

Contributory negligence — charge to jury.

Where, in an action by a pedestrian who was struck by an automobile while he was crossing a street, the question of the plaintiff's contributory negligence was fully and fairly covered by the instructions given, there was no error in refusing to instruct that the plaintiff was guilty of contributory negligence, if he failed to look before he started to cross the street and while crossing the same.

New trial — misconduct of juror.

Refusal of the trial court to grant the defendant a new trial on the ground of misconduct of one of the jurors in conversing with one of the witnesses for the plaintiff, etc., *held*, upon the showing made, clearly proper.

Action in the district court for Watonwan county to recover $5,000 for personal injuries. The complaint alleged defendant was negligently running his automobile along a certain street at an unlawful and high rate of speed, without any lights, as provided by law, and without giving any signals of his approach as provided by law, to warn plaintiff of his approach; that by reason of his negligence in the operation of the automobile, plaintiff was struck by it. his leg was broken, and he was thrown to the ground and otherwise injured. The answer denied every allegation in the complaint except that plaintiff was in fact injured. The case was tried before Pfau, J., and a jury which returned a verdict in favor of plaintiff for $1,400. From an order denying defendant's motion to set aside the verdict and for a new trial, he appealed. Affirmed.

Hammond & Farmer, for appellant.

J. E. Haycraft and *S. B. Wilson,* for respondent.

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PHILIP E. BROWN, J.

Action to recover damages for personal injuries suffered by the plaintiff in colliding with the defendant's automobile. The cause was tried to a jury, who returned a verdict for the plaintiff. This is an appeal by the defendant from an order denying him a new trial.

The complaint charged in substance that while the plaintiff was crossing Main street in Madelia, on November 29, 1910, he was run down and injured by an automobile owned and driven by the defendant, which accident occurred without fault on the plaintiff's part, and because the defendant was negligent in propelling the machine at an unlawful and high rate of speed, without lights and in violation of law. The defendant answered, admitting that the plaintiff was injured and putting in issue the other claims recited. It appeared on the trial that the accident happened in the evening of the day stated.

1. We conclude from an examination of the record that there was sufficient evidence to warrant the jury in finding that the defendant was negligent as charged. In fact the defendant makes no serious claim to the contrary.

2. The defendant asserts that the court erred in charging the jury as follows:

"I will further charge you in this case, that if the plaintiff was negligent in this case, and did place himself in a negligent position, and if the defendant, before the happening of the injury or accident, discovered the negligence of the plaintiff, but by and through the want of ordinary care upon his part, after discovering the danger of the plaintiff, the danger that he was in, caused by his own negligence, nevertheless ran against him and injured him, operating his machine without using ordinary care, that the plaintiff can recover and should recover a verdict at your hands. On the other hand I charge you, gentlemen, that if the defendant, after discovering that the plaintiff had placed himself in a dangerous position, was negligent, guilty of negligence on his part, if the defendant used ordinary care on his part, that the plaintiff cannot recover."

The defendant contends that this instruction constituted error for the following reasons: (a) That the complaint contains no allega-

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tions charging the defendant with the commission of wilful negligence, which claim is true; (b) that the evidence is insufficient as a predicate for the instruction or to sustain a finding of the defendant's guilt of wilful negligence. The defendant forcefully argues that since this action is plainly one, under the allegations of the complaint, for the recovery of damages inflicted because of ordinary negligence, no question of wilful negligence was involved; that, to warrant the court in submitting a claim grounded upon this latter charge, the plaintiff must plead the material and ultimate facts constituting such negligence, to the end that the defendant may be apprised of the charge he is to meet, and of the precise subject of the controversy, in order that he may have an opportunity to prepare his defense, and the plaintiff, having failed in this regard, should not be permitted to prove upon the trial or, at least, to have submitted to the jury the effect of negligence materially different in kind from that alleged.

We are not agreed upon the proper determination of the point of pleading here involved, as an abstract proposition. We hold, however, that it is not necessary to the decision of this case to pass upon such question, because, at most, if there were sufficient evidence in the record to justify the court in submitting the so-called "wilful negligence" of the defendant to the jury, a question which we will presently consider, then under the facts we would have a case, we think, of mere harmless variance. R. L. 1905, § 4158. Wilcox Lumber Co. v. Ritterman, 88 Minn. 18, 92 N. W. 472; Kaufman v. Barbour, 103 Minn. 173, 114 N. W. 738. The several features of the cause of the accident were fully covered by the evidence and evidently the defendant was not misled. From the fact that the alternative portion of the instruction complained of embraces the substance of one of the defendant's requests, it is apparent, also, that this issue was litigated without objection, and hence objections now made are unavailing. 2 Dunnell, Minn. Dig. § 7675. Moreover, no exception was taken on the trial to the portion of the charge now criticised, which, we hold, was necessary in order to raise the question now under consideration, under the rule of Steinbauer v. Stone, 85 Minn. 274, 88 N. W. 754, and subsequent cases developing its application.

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Nevertheless, it was error to give this instruction, if it be true, as claimed by the defendant, that the evidence adduced on the trial was insufficient to warrant the submission of this phase of the case. We have examined the record in this regard. No useful purpose would be subserved by stating the evidence in detail. That the plaintiff was in a place of danger immediately before the collision is established by the result, and clearly such place was made unsafe by the interposition of defendant's machine. While the question of the defendant's wilful negligence is a somewhat close one on the proofs, we have concluded that the evidence was sufficient, if believed by the jury, to warrant the deduction therefrom that the defendant saw the plaintiff's peril in time to have avoided striking him with the machine, had he thereafter used ordinary care in its management; and furthermore that the verdict cannot be disturbed on this ground after being approved by the trial court.

3. The defendant claims that the trial court erred in refusing to give the following instruction, requested by him:

"You are instructed that if the plaintiff did not look at the time he started across the street, or while crossing the street, or until the automobile was upon him, he did not exercise common prudence, and was guilty of contributory negligence."

We find no error here. The jury were fully and fairly instructed concerning the defendant's claim that the plaintiff was guilty of contributory negligence, and the requested instruction comes within the rule that the court is not required to charge as to the effect of particular items of evidence or what conclusion may or may not follow therefrom. Senro v. Chicago & N. W. Ry. Co. 115 Minn. 110, 131 N. W. 1011. We also think that, assuming this requested instruction to be abstractly correct, which is more than doubtful in the light of Stallman v. Shea, 99 Minn. 422, 109 N. W. 824, it was not warranted by the evidence.

4. The last claim urged by the defendant is that there was misconduct on the part of the jury. The showing made by the defendant below in support of this claim amounts to this: One of the witnesses called by the plaintiff, after testifying on the trial favorably to the plaintiff's theory, and also being strongly prejudiced in the

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plaintiff's favor and cognizant that one Jacobson was a juror in the case, called such juror into a saloon, during an intermission of the court's proceedings occurring prior to the conclusion of the giving of evidence on the trial, in a surreptitious manner, and after having a private conversation with him therein, treated him to a cigar. Neither the alleged conversation nor its purport appears, and the affidavits offered fail to connect the plaintiff with this transaction. Furthermore, the affidavits offered by the plaintiff contradicted the allegations of those of the defendant in regard to the matter. It also appears that both the defendant and his counsel were advised of the existence of the alleged facts, the defendant himself prior to the submission of the case to the jury, and his counsel before the verdict was rendered, and that no steps were taken to apprise the court thereof. Under these circumstances the trial court was clearly right in refusing to grant a new trial on this ground. See 2 Dunnell, Minn. Dig. §§ 7104, 7107. The rule of this court is stated in section 7105.

Order affirmed.

OCTAVE A. POIRIER v. JOHN M. BRADFORD.[1]

November 29, 1912.

Nos. 17,957—(99).

Sale of patented article.

A corporation was organized to manufacture and sell certain farm implements covered by patents obtained by plaintiff, and to be obtained by him at the expense of the corporation; plaintiff was the manager, a stockholder and officer of the corporation; for the right to use such patents in the manufacture of such implements, plaintiff was monthly paid a certain sum in the nature of a royalty. *Held*, that the right to sell the articles so manufactured under plaintiff's patents was incident to the right to manufacture, and therefore all articles manufactured while that right existed, may, after such right ceased, be sold by the corporation or its successor in interest without let or hindrance from plaintiff.

[1] Reported in 138 N. W. 687.

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Action in the district court for Ramsey county to enjoin defendant from infringement of a certain patent; to have defendant account for profits made in the sale of disc drills in infringement of letters patent and plaintiff's rights thereunder, and for $30,000 damages. The answer alleged that the court had no jurisdiction of the alleged cause of action set forth in the complaint, for the reason that all suits for infringement of patents are exclusively within the jurisdiction of the United States Circuit Court; set up the transfer of patent rights from plaintiff to the Poirier Manufacturing Company as the sole consideration paid by plaintiff for stock in that company; and alleged that company became insolvent and a sale of the drills to defendant by the trustee. The reply alleged that about October 1, 1907, another person was substituted as vice president and secretary of the manufacturing company and in accordance with the terms of the agreement mentioned in the opinion that act canceled and terminated the license of the company to manufacture and sell the machines, and the sale to defendant was made without the license or consent of plaintiff.

The case was tried before Kelly, J., who made findings and as conclusions of law found that defendant was the absolute owner of all the disc drills and unassembled parts of disc drills referred to in the complaint and answer, with full power to sell and dispose of the same as his own property. From an order denying plaintiff's motion for a new trial, he appealed. Affirmed.

Harry S. Locke, for appellant.

Denegre & McDermott, for respondent.

Holt, J.

Claiming that the defendant had in his possession 400 disc drills, and unassembled parts for about 800 more, made according to principles covered by certain letters patent owned by plaintiff, which drills defendant threatens to sell without the license or permission of plaintiff, this action is brought to enjoin defendant from selling or using the drills. The court made findings and ordered judgment for defendant. Plaintiff's motion for a new trial being denied, he appeals.

The here material and undisputed facts are that plaintiff owned

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a patent for a drill shoe, which was thought valuable, and in 1902 he associated himself with some men who furnished the means and incorporated the Poirier Manufacturing Company, to manufacture and sell drills equipped with this shoe. Plaintiff became, and thereafter till October, 1907, continued to be, the secretary, vice president, and manager of the corporation. He received 250 shares of stock of the par value of $100 per share. Plaintiff was an inventor and, in addition to the shoe for grain drills, had also turned his attention to disc drills. Soon after the incorporation of the company he applied for several patents covering such drills, the company paid the fees and expenses for obtaining these patents, and under plaintiff's management manufactured and put on the market disc drills covered by patents subsequently issued upon his applications. The arrangement between plaintiff and the corporation is contained in this letter, written by the former to the latter:

"January, 1903.

"Poirier Mfg. Co.,
"Gladstone, Minn.

"Gentlemen: —

"Confirming the conversation had with your Mr. Brooks last Saturday, relative to my certain inventions of improvements on grain drills, at which time it was agreed that the Poirier Mfg. Co. should pay all the expenses for labor in procuring models and furnish all the cash necessary for applications for U. S. patent and final government fees, that I should grant to said Poirier Mfg. Co. the right to use such inventions before and after the issuance of the U. S. patents, free of charge, for such time as my present interest in your company as stockholder and officer is retained, but that in no way shall the title or ownership of said inventions and contemplated patents pass from me to you, without further agreement and consideration.

"Respectfully yours,
"O. A. Poirier."

Plaintiff received $150 per month from the corporation which he says was in the nature of royalties for the use of his patents. In

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September, 1907, plaintiff, on account of some nervous trouble, became incapacitated for work. He was not paid anything thereafter, as he claims. No disc drills nor any parts of drills were ever manufactured thereafter. The drills and parts of drills now in defendant's possession were all completed by the corporation prior to September, 1907. The drills manufactured were evidently not a success, for the corporation, in August, 1908, was duly adjudicated a bankrupt and the said drills and parts of drills were in the bankruptcy proceeding duly sold to defendant herein. Plaintiff still retains his stock in the corporation, but ceased to be an officer in February, 1908.

The foregoing facts clearly indicate that there is no justice in plaintiff's claim. The defendant had succeeded to the rights of the corporation in this property, which was manufactured for the purpose of sale and use by the permission, license and direction of plaintiff. These implements and parts were so manufactured in the ordinary course of business, with the expectation that all would be sold in due time. The manufacture was undertaken solely for the purpose of realizing a profit from the sale of the article manufactured. So that the sale and use of the drill followed as an incident to the right to manufacture. In other words, plaintiff having granted the corporation, for a royalty paid monthly, the right to manufacture, according to his patents, these implements designed for sale and use, has no further interest in their disposition or use after they have been manufactured. Therefore the position of plaintiff is untenable that, if he chose to withdraw his license, the manufactured articles then on hand could not be sold. In Steam Cutter v. Sheldon, 10 Blatch. 1, the court says at page 8:

"If a party engaged exclusively in the construction of machines of various kinds, for sale to others, were to receive a license to manufacture a patented machine, for a consideration presently paid to the patentee, a construction which would deny him all opportunity to make the privilege of any value, forbidding his sale of the machines when manufactured, should be very clearly imported by the license, or the court would hold that the parties meant that he should derive

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some benefit from the license, and not be left thereafter wholly dependent on the will of the patentee."

See also Gill v. United States, 160 U. S. 426, 40 L. ed. 480; Keyes v. Eureka Consolidated Mining Co. 158 U. S. 150, 39 L. ed. 929; Dable Grain Shovel Co. v. Flint, 137 U. S. 41, 34 L. ed. 618.

We do not think the facts of the present case bring it within the decision of Standard Sanitary Mnfg. Co. v. Arrott, 135 Fed. 750, cited and relied on by plaintiff. There the machine covered by the patent was built for the purpose of use in the manufacturing plant under a license given by the patentee, he being an officer and servant of the company operating the plant. It was held that a sale of the plant did not transfer to the new owner the right to use the machine. We doubt not the proposition that the owner of a patent may, in granting the right to use the same, place such limitations and restrictions as he may see fit. But clearly there was no intention in the instant case to restrict in any manner the sale or use of the articles manufactured by the corporation. And defendant is in no worse position than the corporation.

The views already expressed lead to an affirmance of the order, and render unnecessary a consideration of any other errors assigned, because, on the undisputed facts, the learned trial court's conclusion is manifestly right.

Order affirmed.

NAISH McKINNON and Another v. RED RIVER LUMBER COMPANY.[1]

December 6, 1912.

Nos. 17,746—(91).

Log lien—who not entitled to.

The owner of horses who hires them to a contractor, the latter using the

[1] Reported in 138 N. W. 781.

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horses in aid of hauling and banking logs, and the owner performing no manual labor or other services in connection with the logs, is not entitled to a lien on such logs under R. L. 1905, § 3524.

No estoppel by judgment.

A prior judgment in an action by the owner of the horses against the contractor to recover a personal judgment for the agreed price of their services, and against defendant in this action to establish and foreclose a lien claimed by such owner, is *held* not to estop defendant from now claiming that plaintiffs acquired no lien on the logs, the judgment being merely a personal one against the contractor, and it appearing that the court in such action did not and could not adjudicate such lien.

Action in the district court for Hubbard county to recover $1,296 for conversion of certain saw-logs. The answer specifically denied that plaintiffs had any lien upon logs belonging to defendant, alleged that on or about May 3, 1911, a petition in involuntary bankruptcy was filed in the United States district court, alleging that John Sibley was a bankrupt, and that the sum claimed in the complaint was alleged in the petition to be part of the assets of the estate of the bankrupt, subject to the supervision and control of the United States district court, and prayed that the action be dismissed. The case was tried before Wright, J., who at the close of the testimony denied plaintiffs' motion for a directed verdict and granted defendant's motion for a directed verdict. From an order denying their motion for judgment notwithstanding the verdict or for a new trial, plaintiffs appealed. Affirmed.

Charles W. Scrutchin, for appellants.

P. V. Coppernoll, for respondent.

Bunn, J.

Plaintiffs brought this action to recover the sum of $1,296, the amount of a claimed lien on logs which had been sawed and converted into lumber by defendant. At the close of the evidence each party moved for a directed verdict. The court granted defendant's motion. Plaintiffs afterwards moved for judgment notwithstanding the verdict or for a new trial, and appeal to this court from an order denying this alternative motion.

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There are two main questions for our consideration: (1) Did plaintiffs have a valid lien on the logs in question? (2) If not, is defendant estopped from denying the validity of the lien by reason of a former judgment?

The facts are as follows: John Sibley was engaged in logging and lumbering in the Second lumber district, under contract with defendant. Plaintiffs entered into a written contract with Sibley, by the terms of which they hired and let to him twelve teams of horses at the agreed price of $26 per month for each team. These teams worked for Sibley in hauling and banking the logs he was under contract to haul and bank for defendant. Lapalm, one of the plaintiffs, worked for Sibley in caring for the horses, and drove one of the teams on the work. He was to receive $40 per month for his services, which was paid by defendant. The contractor, Sibley, became insolvent. Plaintiffs, after demanding payment for the services of their horses, both of Sibley and of defendant, filed a lien on the logs for such services. The lien statement, as well as the evidence, shows that the amount claimed was only for the labor of the horses, at the contract price, and did not include anything for the personal services of Lapalm, which had been paid for.

The facts in relation to the claim of res adjudicata are these: Within three months after filing their lien statement plaintiffs brought an action in the district court for Hubbard county against the defendant in this action, Red River Lumber Company, and John Sibley. The relief demanded was a personal judgment against Sibley for the amount of plaintiffs' claim for the services of the horses, and a judgment adjudging the lien and directing the sale of the logs to satisfy the same. Neither defendant answered. The court made findings of fact to the effect that the work had been done by the horses at the request of Sibley; that plaintiffs had filed a lien statement, and had thereafter sued out a writ of attachment and placed the same in the hands of the sheriff, but that said writ was not returned for the reason that the lumber company had theretofore sawed the logs involved into lumber. As conclusions of law, it was determined "that plaintiffs are entitled to judgment against the defendant John Sibley in the sum of $1,296 damages, together with

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the costs and disbursements of this action." The judgment against Sibley was entered pursuant to this decision.

1. If plaintiffs' lien was valid, it is clear they are entitled to recover in this action in conversion. The question is whether, under the statute, one who hires horses to a contractor is entitled to a lien on logs, when under the contract of hiring, the owner is not to render personal services in connection with the horses. The statute, R. L. 1905, § 3524, so far as material here, is as follows:

"Whoever performs manual labor or other personal service for hire, in or in aid of the cutting, hauling, banking, driving, rafting, towing, cribbing or booming any logs * * * shall have a lien thereon for the price or value of such labor or service."

This statute should be construed liberally, but we must not, by construction, do violence to the plain meaning of the language used. Were the services performed by the horses hired to Sibley "manual labor or other personal service" performed by plaintiffs? In Martin v. Wakefield, 42 Minn. 176, 43 N. W. 966, it was held that "manual labor," as those words were used in the log lien statute then in force, "includes the use and earnings of all implements, instrumentalities or agencies, such as axe, cant-hook, team, or the like, which are actually used in and necessary to the performance of such labor by the lumberman or logger." Applying this rule to the facts in that case, it was decided that where a man and a team are employed, at a gross price for both, to haul or bank logs, his lien on the logs extends to the use of his team. This was followed in Breault v. Archambault, 64 Minn. 420, 67 N. W. 348, in which case it was also decided that one who furnishes a team and a teamster to a contractor at a gross price for both per month, to haul or bank logs, is entitled to a lien. Carver v. Bagley, 79 Minn. 114, 81 N. W. 757, was decided after the law was amended so as to give a lien to one who performs "manual labor *or other service* for hire," and is important in this connection only as it again announces the rule that the statute is a remedial one and should be given a broad and liberal construction.

It is clear that the present case is not controlled by Martin v.

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Wakefield, Breault v. Archambault, or by any decision of this court. Here the contract was only for the use of the teams at an agreed price for each team per month. It did not provide for the services of teamsters, or of men to care for or shoe the horses. The fact that one of the plaintiffs was employed by Sibley under a separate contract to care for and attend to the shoeing of the horses does not bring the case within either of those cited. In addition to the fact that this employment of Lapalm was under an entirely separate and distinct contract, the lien statement shows that no lien was claimed for his services, and the evidence shows that they had been paid for before the lien was filed. The case must be treated therefore as if plaintiffs had performed no personal services.

The question has been decided adversely to plaintiffs' contention in Wisconsin, Maine, and Michigan, under statutes identical with ours. Lohman v. Peterson, 87 Wis. 227, 58 N. W. 407; McAuliffe v. Jorgenson, 107 Wis. 132, 82 N. W. 706; Edwards v. H. B. Waite Lumber Co. 108 Wis. 164, 84 N. W. 150; Richardson v. Hoxie, 90 Me. 227, 38 Atl. 142; Mabie v. Sines, 92 Mich. 545, 52 N. W. 1007. Each of these cases is absolutely in point, and no authority to the contrary is known to us. Indeed we do not see how an opposite conclusion could be reached except by a main strength construction of the words of the statute. The owner of horses, machinery or tools who leases his equipment to a contractor certainly does not "perform manual labor or other personal service for hire" in aid of the cutting, hauling, or banking of logs which the contractor by himself and his servants does under his contract. The contractor has a lien for his own and his employees' labor, and for the use of all instrumentalities, including teams, which are actually used in and necessary to the performance of such labor by the contractor and his employees. Sibley doubtless would have a lien upon the logs for his own and his employees' services, including the services of the teams with which they worked. This is the rule of Martin v. Wakefield, and Breault v. Archambault, supra, and is also the rule in Wisconsin, Michigan, and Maine. But we must hold that the owner of teams or instrumentalities who leases or hires them to a lumberman, or logger, and who does not by himself or by his servants perform manual labor or other service, is not entitled to a lien on logs for

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the service of such horses or instrumentalities. A contrary holding would not only be against the plain words of the statute, and the decision cited, but it would open the door to abuses. If an owner of horses leased to a logger is entitled to a lien, so is the owner of any equipment, machinery or tools leased to a logging contractor. And why not the grocer or butcher that supplies the camp of the contractor? Or the merchant that sells the men their clothing?

2. The claim that defendant is estopped by the judgment in the former action is wholly untenable. While in that suit plaintiff claimed a lien on the logs and asked to have it established and the logs sold to satisfy it, it is perfectly clear from the judgment and findings that the matter of the lien was not and could not be litigated. The judgment, which followed the conclusions of law, was simply a personal judgment against John Sibley. The decision does not find that plaintiffs had a lien which was valid; indeed it finds the contrary, as it is recited that an attachment was issued, but not returned because the logs had been sawed into lumber. An attachment of the logs was necessary to an adjudication that plaintiffs had a lien which they were entitled to enforce. Griffin v. Chadbourne, 32 Minn. 126, 19 N. W. 647.

We find no other points that require discussion. The decision of the trial court was correct.

Order affirmed.

OLGA VON W. HASKELL v. WILLIAM E. HASKELL.[1]

December 6, 1912.

Nos. 17,754—(96).

Appealable order.

An order, made upon the merits, denying an application for a reduction of alimony previously awarded, on the ground of the changed financial condition of the parties, *held* appealable.

[1] Reported in 138 N. W. 787.

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Alimony — modifying judgment.

While an application for the revision of a judgment for alimony, on the grounds of changed financial condition of the parties should be entertained with great caution, nevertheless, where the change is not wilfully brought about by the applicant, the motion should be disposed of under the same rules applicable upon an original application to fix the amount of alimony, and a modification of the former judgment may be made on account of the changed financial condition of either or both of the parties.

Error to deny application.

An order denying an application for a reduction of alimony, on the ground of the changed financial condition of the parties, *held* erroneous.

Motion in the district court for Hennepin county to modify the judgment in an action for divorce, by reducing the amount of alimony to be paid to plaintiff. After the former appeal, reported in 116 Minn. 10, 132 N. W. 1129, the motion was heard by Hale, J., who made findings as set forth in the opinion. From an order denying the motion, defendant appealed. Reversed and remanded, with instructions to modify the original judgment as to alimony, so as to reduce the amount to be paid annually by defendant to plaintiff, in equal quarterly payments, from $5,000 to $3,000.

Kerr & Fowler, for appellant.

Koon, Whelan & Hempstead and *A. B. Jackson,* for respondent.

Philip E. Brown, J.

This is an appeal from an order of the district court of Hennepin county, entered March 14, 1912, denying the appellant's motion for reduction of the amount which the appellant is under obligation to pay to the respondent annually as alimony under and by virtue of a judgment, entered January 22, 1903, whereby the respondent was granted an absolute divorce from the appellant on the ground of desertion. The motion is the second one made in this case seeking the relief indicated, and likewise the second time that the matter has been before this court, the order of the district court denying the appellant's former motion having been reversed and the cause remanded November 3, 1911. See Haskell v. Haskell, 116 Minn. 10, 132 N. W. 1129, where the provisions of the judgment concerning alimony are set out in full.

The present motion is based upon the files and proceedings in the

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divorce action above mentioned, upon the appellant's affidavit presented in support of his former motion, and upon additional and supplementary affidavits. The motion, as stated in the notice thereof, is: "For an order modifying the judgment and decree heretofore entered in said action in respect to alimony, and relieving defendant from the payment of the alimony at present required, and reducing the alimony required to be paid by defendant to plaintiff to the sum of $600 per quarter or $2,400 per year;" the grounds of the motion being, "that the financial condition of the defendant has materially changed since the entry of judgment herein, that he is now without property or income, or means wherewith to pay the alimony required by the judgment, and that plaintiff is possessed of a large amount of property of large value, and that she does not need the alimony provided for by said judgment, and that defendant is unable to pay the alimony in said judgment provided." Opposing affidavits were filed, and the court, after a hearing, found, in substance:

1. That since the rendition of the judgment herein involved, the appellant had lost all his property, was indebted in a sum exceeding $600,000, and was insolvent, but that for many years he had earned and received a large income in his business and profession as a newspaper man, and that he is still capable of doing so, notwithstanding that his latest affidavit supporting the application stated that he was then temporarily out of employment.

2. That there has been no substantial change in the plaintiff's financial situation or needs since the rendition of the judgment, but, on the contrary, that she was still wholly dependent upon the payment of the alimony for the support and maintenance of herself and children and their education, they being still dependent upon her; that the alimony is no more than is reasonably required to enable the plaintiff suitably to maintain herself and children, who are still dependent upon her, and to maintain her home and household in a manner comporting with her station in life, and in which she and her children are entitled to be maintained; and that a reduction of the alimony would be unjust to her.

Wherefore, the court denied the appellant's motion, for the reason,

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as indicated by its memorandum, that: "While the defendant has since [the rendition of the judgment] lost his property and become bankrupt, that circumstance does not, in my judgment, furnish sufficient grounds for modifying the judgment in plaintiff's favor, unless such a change in plaintiff's circumstances has taken place as would make such modification just to her, as well as advantageous to defendant. This does not appear to me to be the case, and on the whole showing I think it would be a manifest injustice to the plaintiff to modify or disturb the judgment."

1. At the outset we are met with a motion to dismiss the appeal, on the ground that the order denying the appellant's motion to reduce the alimony awarded by the judgment of divorce, is not appealable. In Smith v. Smith, 77 Minn. 67, 79 N. W. 648, and also in Bowlby v. Bowlby, 91 Minn. 193, 97 N. W. 669, the appealability of such an order was questioned. After considering the question, however, we have concluded that the order is appealable.

2. Coming, then, to the merits of the appeal, the trial court's reason for its denial of the appellant's application, as indicated by its memorandum recited above, requires some consideration of the nature of applications of the character here involved, with the view of ascertaining the rule under which the contentions of the parties are to be determined; for we think the attitude of the trial court, as expressly indicated by the reason assigned for its decision, was erroneous.

Speaking generally, alimony is not awarded as a penalty, but as a substitute for marital support. York v. York, 34 Iowa, 530; Harris v. Harris, 31 Gratt. 13; State v. Superior Court, 55 Wash. 347; Thomas v. Thomas, 41 Wis. 229. It is wholly statutory, as is also its modification, its allowance in the first instance being governed by R. L. 1905, § 3590, and revision of judgments for alimony being governed by section 3592. The principles governing the alteration of adjudged alimony were summarized by Mr. Justice Simpson on the former appeal (See Haskell v. Haskell, supra, p. 13) as follows:

"Under the statute of this state the court awarding a judgment for alimony, whether such alimony be payable in a gross amount or in instalments, has undoubted authority to revise or modify such

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judgment. This power may be exercised upon the application of either party for good cause shown. A substantial change from the situation that prompted or made proper the terms of the original decree justifies a change in those terms. An application for such change or modification is addressed largely to the discretion of the trial court."

In addition to what we have quoted from the opinion cited above, it should be stated that motions of the character referred to, based upon the ground of changed financial condition of either of the parties, should be entertained with great caution. Nevertheless, we think that where the change is not wilfully brought about by the applicant, the motion should be disposed of under the same rules applicable upon an original application to fix the amount of alimony in the first instance, and upon the same considerations, so far as concerns the determination of the amount to be allowed if a change is made. Upon an original application, the amount which may be awarded is limited by the statute, section 3590, and in no event can it exceed one-third in value of the husband's personal and real property, and a portion of his earnings and income not exceeding in present value the same proportion thereof. So also upon an application for a change of alimony, the wife is entitled to receive so much, and only so much, as she would reasonably have been entitled to receive from her husband had the change in his financial condition come immediately before original award. While the necessities of the wife constitute an important consideration, there must also be considered, in determining the amount of alimony, either upon an original application therefor or upon a motion to increase or decrease, the financial ability of the husband to pay. Furthermore, while applications of the character here under consideration or for an increase of alimony are addressed "largely to the discretion of the trial court," as above declared, the discretion referred to is not arbitrary but judicial, and must be exercised in harmony with the rule stated. Of course in the practical application of the rule, we do not mean to say that it must be applied with mathematical certainty, but merely that the standard with reference to which the amount to be allowed the wife for support and maintenance, after the severance of the mat-

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rimonial bonds, is practically the same both on the original award and on any subsequent judicial change thereof.

The rule followed by the trial court contravenes the one here stated, and also the holding in Bowlby v. Bowlby, supra, to the effect that the changed circumstances of either party may warrant a change. The sanction and application of such a rule would, we think, frequently prevent any reduction of awarded alimony, although subsequent events occurring without the fault of the husband had materially altered his financial standing for the worse, and even though he were then so circumstanced that it would be impossible for him to continue to pay the sums adjudged payable to the former wife.

3. Applying the rule above announced to the present case, the final question for our determination is: Was the order of the trial court correct, notwithstanding the erroneous rule under which the decision was reached? As we have already stated, the present motion is predicated upon the defendant's affidavit, which constituted the basis of the defendant's former motion, together with additional affidavits, and we have also counter affidavits filed by the plaintiff. Upon the showing made by the affidavit on the former motion, no counter affidavits having been filed thereon, this court has declared that the appellant was entitled to have the amount of the annual allowance reduced. See Haskell v. Haskell, supra, where the recitals of such affidavit are set forth in detail, at page 12. "It is clear, therefore," declared Mr. Justice Simpson, at page 13, "that facts were shown making a modification of the judgment not only justifiable, but required under the established rule."

It is true, as contended by the respondent, that the case on that appeal was treated as involving certain formal questions not affecting the merits as between the parties to this appeal, but the above quoted language indicates the attitude of the court upon the showing there made, and, moreover, we think that such attitude was entirely justified.

Unless, therefore, there is something in the defendant's additional affidavits or in the counter affidavits offered by the plaintiff, to weaken the showing made by the affidavit on the former motion, it follows that the defendant was entitled to a reduction upon his present

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application. The findings above referred to, of the trial court, purport to represent the total showing upon which the order here appealed from was based, but in our opinion they do not present the appellant's showing as strongly as the allegations of the various affidavits before the court would seem to have warranted. But we will assume that such findings correctly show the plaintiff's financial status at the time of the hearing, except that it should have been made to appear thereby that the plaintiff had failed to get any other than temporary employment for a number of years, and this at a salary such that nearly four-fifths of the same was consumed by the alimony paid to the defendant, and that he had diligently and continuously tried to get steady employment, and further that his condition was not due to any intent or attempt to defraud the respondent or to evade the payment of alimony to her, and, finally, that he was, at the time of the application, forty-nine years old. We will likewise assume that the finding as to the financial situation of the respondent fairly represents the showing made by the parties, and that she is as fully dependent as ever she was upon her allowance of alimony, though here again it might well have been made to appear, from the proofs before the court, that two of the four children, the custody and care of whom were awarded to the respondent by the divorce judgment, had, since such judgment, become of age, one, moreover, being self-supporting and the other partly so. But even upon the finding made, we think that the trial court erred in denying the defendant relief; for it is apparent that the plaintiff could not have been legally awarded the sum as alimony which is here involved, if the defendant's financial condition had been the same then as it was at the time this application was made.

It does not follow, however, that the respondent's allowance is to be entirely cut off, or that it is even to be reduced to the figure specified in the appellant's motion for reduction. The appellant's prospects are to be considered (Muir v. Muir, [Ky.] 4 L.R.A.(N.S.) 909, and note), and alimony may be awarded even in the face of a showing of total lack of present property and income. 2 Am. & Eng. Enc. (2d Ed.) 123; Snedeger v. Kincaid, 22 Ky. L. R. 1347; Canine v. Canine, 13 Ky. L. R. 124.

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Upon the showing made, therefore, including the admission of undisclosed resources involved in the appellant's offer to pay $2,400 a year, we deem it equitable and just that he should be required to pay $3,000 annually to the respondent as alimony, in lieu of the $5,000 which he has heretofore been under obligation to pay.

Other contentions urged upon this appeal were fully disposed of on the former appeal, and need not here be discussed.

Ordered that the order appealed from be and it is hereby reversed, and that the cause be remanded with instruction to modify the original judgment herein as to alimony, so as to reduce the amount to be paid annually by the defendant to the plaintiff, in equal quarterly payments, from $5,000 to $3,000.

THOMAS H. BROWN v. FRED J. HAGADORN and Others.[1]

December 6, 1912.

Nos. 17,777—(104).

Registration of title to land — person acquiring interest pendente lite.

Under R. L. 1905, § 3395, providing that where a person acquires an interest in land, pending proceedings to register the title thereof, and prior to the entry of decree, he must appear and answer in such proceedings "at once," persons who delayed more than six months after actual notice of proceedings to register the title to certain land, before making application for permission to answer in such proceedings in order to assert interests alleged to have been acquired pendente lite, were not entitled to answer as a matter of right, R. L. 1905, § 3396, having no application to such a case.

Discretion of trial court.

The trial court *held*, in such case, not to have abused its discretion in denying the application for leave to answer.

Application to the district court for Crow Wing county to register title to certain land. The facts are stated in the opinion. From an

[1] Reported in 138 N. W. 941.

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order, McClenahan, J., discharging the order to show cause and denying the application of William H. McGrath, James E. McGrath and Robert W. McGarry, for leave to answer and defend in that proceeding, and from the rulings, decisions and orders adverse to them, they appealed. Affirmed.

Jay Henry Long, for appellants.

Edward C. Stringer, McNeil V. Seymour and *Edward S. Stringer,* for respondent.

PHILIP E. BROWN, J.

Appeal by William H. McGrath, James E. McGrath and Robert W. McGarry from an order of the district court for Crow Wing county, denying their application for leave to answer in the matter of the application of Thomas H. Brown to have registered the title to certain lands therein, under the provisions of R. L. 1905, c. 65.

The motion was presented solely upon affidavits and documentary evidence, from which it appears, without controversy, that the applicant was on March 10, 1911, the record owner of the lands in question, and on that day filed an application for the registration thereof. The matter was duly referred to the examiner, who, on March 28, reported that the land was vacant and unoccupied, and while the applicant's title was proper for registration, yet certain parties not concerned in the present litigation should be joined as parties to the proceedings. Neither Fred Hagadorn, under whom the appellants claim, nor the appellants were mentioned therein. On April 7, the summons issued in the proceedings, and was served on all of the parties mentioned in the report of the examiner, and on June 8 all parties defendant, except those mentioned as not being material, were in default. On August 4, 1911, the appellants and Fred T. Hagadorn entered into a contract, reciting substantially that he was the owner of the land which is the subject of this action, but that his title was being attacked and litigation thereof was threatened by certain parties claiming pretended title thereto, and he was desirous of obtaining money and legal assistance to defend his title, if required so to do, and therefore he sold and agreed to convey to appellants by warranty deed an undivided two-thirds of the prem-

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ises, agreeing to continue living on and improving and cultivating the premises as formerly, care for appellants' interests, fence the premises, if required to by appellants, see to the survey, and to care for the appellants' interests in all ways; that, should his title be now in dispute or disputed at any time hereafter, he would prosecute his defense in such case to his utmost ability, and by all honorable means defend the same, and that he would remain upon the premises as an ordinary dweller thereon, as formerly, until his title was adjudicated and settled; and, furthermore, that he would co-operate with the appellants in the defense of the title and obtain all necessary witnesses, etc.; the contract also provided that the appellants would pay Hagadorn $200 upon the execution and delivery of a warranty deed well and truly conveying the above described premises, $100 on the first day of January, 1912, and a like sum on April 1, and July 1, thereafter; and that they should aid, assist, and advise in any litigation, pay legal expenses, expenses of survey and material for fencing the premises, if fencing was thought necessary. On the following day William H. McGrath, one of the appellants, advised the applicant's attorneys that he represented Hagadorn, who, he alleged, was the owner of the land by adverse possession, and requested a stipulation permitting him to interpose an answer for Hagadorn. No action was taken upon this request. On October 27, 1911, upon the applicant's petition, Hagadorn was made a party to the proceedings, and on the following day a supplemental summons was issued, which was served on him on October 30. On November 2, 1911, Hagadorn executed a warranty deed to the appellants for two-thirds of the premises, which deed was not recorded until March 13, 1912. Hagadorn answered in the proceedings by his attorneys McGrath & Cary, said McGrath being William H. McGrath, one of the appellants, on November 20, 1911, setting up title in himself in fee to all the lands in controversy by adverse possession. On November 23, 1911, the said attorneys, in behalf of Hagadorn, moved to dismiss the application for registration, and also moved to submit issues joined therein to a jury. Attached to the first motion referred to was an affidavit made by Hagadorn to the effect that he was the owner of the premises. Both motions were denied January 18, 1912. On February 17,

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1912, Hagadorn delivered to the applicant a quitclaim deed to the premises in consideration of $150, paid by the applicant, who, on the same day, paid the taxes on the land and recorded the deed. The deed contained the following clause:

"And the party of the first part [Hagadorn] consents and directs that judgment be entered adjudging that he has no right, title or interest in said land, and that title be adjudged in the party of the second part [Brown] in those certain proceedings now pending in the district court of said Crow Wing county brought by the second party to register the title to said land."

On March 16, 1912, the application of the appellants to answer in the said proceedings in their own behalf was made, the proposed answer alleging that Hagadorn obtained title to the property by adverse possession and conveyed the same to them by his deed delivered November 2, 1911, and from the order denying such motion this appeal was taken. Appellant James E. McGrath is a brother of William H. McGrath, and appellant Robert W. McGarry was a business associate of both, especially in land transactions.

In addition to the undisputed facts appearing as recited above, affidavits were presented on the part of the moving parties tending to show that Hagadorn acquired title by adverse possession. The showing in this regard, however, was meager, and it appeared from the affidavits offered in opposition, and it was undenied, that Hagadorn had never paid any taxes on the land, that he never had color of title thereto, and, further, that on August 10, 1910, he wrote applicant requesting permission to act as his agent in the sale of the land or in the drilling thereon. The affidavits were also conflicting concerning Brown's knowledge of either the contract or the deed between Hagadorn and the appellants.

1. Coming now to the merits of the appeal, the appellant contends that his application must be considered on the theory that James E. McGrath and Robert W. McGarry had no notice of the registration proceedings until after Brown obtained the deed from Haga-

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dorn. We cannot sustain this claim, for it is inherently improbable. It is not at all likely that William H. McGrath, who, as stated, was a brother of James E. McGrath, and a business associate of the said James and the said McGarry, and who appeared as attorney for Hagadorn in the latter's answer in these proceedings, would fail to advise his associates of the fact, within his knowledge, that Brown was proceeding to register the title to the land of which they claimed to be part owners. Besides, the recitals of their contract indicate quite clearly that they were cognizant of the pendency of the proceedings.

2. The appellants contend that they were entitled to answer as a matter of right. This claim is predicated, as we understand it, upon the ground that R. L. 1905, § 3396, provides a six month's limitation for the bringing of an action questioning a decree of registration, and that they had the right to answer within such six months. This contention cannot be sustained. It is in contravention of R. L. 1905, §§ 3394, 3395, the latter section providing that, where any interest in the land sought to be registered is acquired subsequently to the filing of a copy of the application to register with the register of deeds, and prior to the entry of decree, the party so acquiring such interest shall "at once" appear and answer as a party defendant. The moving parties have not brought themselves within the provisions of this section. Even if the expression "at once" be construed as meaning within a reasonable time, under the circumstances of the case, as contended by the appellants, still the moving parties did not comply with the requirement of the statute; for it must be held that they had notice of the registration proceedings more than six months before making their application to answer, and after acquiring their alleged interest in the land. Section 3395 does not prohibit the acquisition of interest in lands pending proceedings to register, and prior to the entry of decree therein; but in such event the person so acquiring the interest must appear and answer as a party defendant "at once," so that the decree shall adjudge the interest of such person. We hold that the moving parties were not entitled to answer as a matter of right.

3. The question remains, however, as to whether the court abused

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its discretion in denying the appellants' application to answer; for we are of the opinion that it was within the discretion of the court, upon the facts, to either allow or disallow such application, under familiar rules of practice governing such applications; it being well settled that proceedings to register title to land are of an equitable nature. Owsley v. Johnson, 95 Minn. 168, 103 N. W. 903; Peters v. City of Duluth, supra, page 96, 137 N. W. 390. Besides, R. L. 1905, § 3385, provides that an answer may be made within such further time, in addition to that prescribed for answering, as may be allowed by the court. While the appellants' point that the claim of the moving parties that their grantor had acquired title to the land in controversy by adverse possession prior to his conveyance to them, could not be determined on a hearing of this motion, must be sustained, yet the court had the right to consider the evident weakness of such claim in determining the application. We conclude that while, on application for registration of title, the court should be quite liberal in permitting parties to answer within the limitations prescribed in chapter 65, yet there was clearly no abuse of discretion in this case. 1 Dunnell, Minn. Pr. § 1890, McClymond v. Noble, 84 Minn. 329, 87 N. W. 838.

Several other and interesting questions have been raised and discussed on this appeal, but the conclusion reached, as above announced, dispenses with the necessity of their consideration.

Order affirmed.

C. R. ERWIN v. DANIEL SHELL and Another.[1]

December 6, 1912.

Nos. 17,873—(78).

Judgment notwithstanding verdict.

A collision occurred on a dark night in a public highway between the

[1] Reported in 138 N. W. 691.

Note.—As to duty and liability of operator of automobile with respect to horses encountered on the highways, see note in 14 L.R.A.(N.S.) 251.

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plaintiff's team, driven by him, and the automobile of the defendants, driven by one of them, whereby plaintiff was injured by the alleged negligence of the defendants in not observing the law of the road. A verdict was returned for him, and the trial court ordered judgment for the defendants notwithstanding the verdict. *Held:*

1. It is not alone sufficient to authorize a judgment notwithstanding the verdict that the trial court upon the evidence, in the exercise of a fair discretion, ought to have granted a new trial, for such a judgment can only be ordered when the evidence is as a matter of law practically conclusive against the verdict.

2. The evidence does not bring this case within the rule stated, and the court erred in ordering judgment for the defendants.

Action in the district court for Nobles county to recover $10,000 for personal injuries. The case was tried before Nelson, J., and a jury which returned a verdict in favor of plaintiff for $300. From the judgment entered pursuant to an order granting defendants' motion for judgment notwithstanding the verdict, plaintiff appealed. Reversed and remanded with direction to enter judgment for plaintiff upon the verdict.

Charles H. Schweizer, Morris & Hartwell and *H. M. Bierce,* for appellant.

J. A. Town and *E. J. Jones,* for respondents.

START, C. J.

On the evening of December 27, 1910, at 8:30 o'clock, the plaintiff was driving a team of horses hitched to a farm wagon with an empty hayrack along the public highway near Worthington, this state, when a collision occurred between the team and rig of the plaintiff and the defendants' automobile, driven by one of them, whereby the plaintiff sustained personal injuries. He brought this action in the district court of the county of Nobles to recover from the defendants damages for his injuries on the ground, as alleged, with others, in the complaint, that the defendants negligently failed to observe the law of the road and drive the automobile to the right of the middle of the

As to duty and liability of person operating automobile on public street or highway, see note in 4 L.R.A.(N.S.) 1130.

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traveled part of the highway, so that the vehicles could pass without interference. The answer admitted the collision, denied any negligence on the part of the defendants, and alleged that the plaintiff's injuries resulted from his own negligence. The issues were submitted to a jury, and a verdict returned in favor of plaintiff in the sum of $300. The defendants then made a motion for judgment in their favor notwithstanding the verdict, on the ground that the court erred in denying their motion for a directed verdict. No alternative motion for a new trial was made. The trial court granted the motion for judgment absolute, and it was so entered, from which the plaintiff appealed.

The law here applicable is well settled, and to the effect that it is not alone sufficient to authorize a judgment notwithstanding the verdict that the trial court upon the evidence ought, in the exercise of a fair discretion, to have granted a new trial, for such a judgment can only be ordered when the evidence is as a matter of law practically conclusive against the verdict. Marquardt v. Hubner, 77 Minn. 442, 80 N. W. 617; Jones v. Minneapolis & St. L. R. Co. 91 Minn. 229, 234, 97 N. W. 893, 103 Am. St. 507; Peek v. Ostrom, 107 Minn. 488, 120 N. W. 1084.

The question, then, is whether the evidence brings this case within the rule stated. The evidence is undisputed that the plaintiff was, at the time of the collision, driving with a gentle team hitched to a wide-tired farm wagon along the highway from Worthington, and that the defendants were driving an automobile toward that city. The night was very dark and misty. The road at the place of collision was fifty-two feet wide between the fences. There was a gutter two feet wide and one foot deep along and next to the fence on plaintiff's side of the road. The traveled track, which was some fourteen feet from the right-hand fence going from Worthington, was worn smooth.

There were no obstructions in the road to prevent the defendants from driving the automobile to the right of the traveled track as the vehicles approached each other, but they did not do so.

There was evidence on the part of the plaintiff tending to show that he was driving four miles an hour, and, when about a mile from the point of collision, he saw a light, and as he got closer, and within

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about a half mile, he saw two lights, and then concluded that an automobile was approaching. When he was within twelve or fifteen rods of it, he noticed that no effort was being made by the defendants to turn out. He thought they would do so, but they did not, so he pulled the right line of his team. The automobile, when it was within some two rods of the team, ran in toward the fence on the plaintiff's side of the road, and the collision followed which resulted in his injury. The next day after the accident there were found, at the place of the collision, marks of a wide-tired wagon in the gutter next to the fence.

There was evidence on the part of the defendants tending to show that the automobile immediately before the accident was not running to exceed eight miles an hour, and that by reason of the darkness the driver could not distinguish an object in front of the automobile more than two rods away, and that he had no notice of the approach of the plaintiff until they were within fifteen to twenty-five feet of each other, and the team was then coming directly toward the automobile. The driver testified that when he saw the team he immediately stopped the automobile in the middle of the traveled track, because he believed there was not time to turn out and avoid the collision, and that any attempt to do so would expose the occupants of the automobile to serious injury, as he believed the team was running away, seeing no driver with them, and, if they were, they would swerve around the automobile.

There was other evidence tending to show contributory negligence on the part of the plaintiff, and also that neither the wagon nor the automobile left the traveled track before the collision.

Upon a careful consideration of all the evidence, we have reached the conclusion that it does not bring the case within the rule we have stated. The credibility of the witnesses, the alleged negligence of the defendants, and the contributory negligence of the plaintiff were primarily questions of fact for the jury. Whether their verdict is so manifestly and palpably against the preponderance of the evidence as to entitle the defendants to a new trial, if a motion therefor had been made, is a question which is not presented by the record. We accord-

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ingly hold that the evidence is not, as a matter of law, practically conclusive against the verdict.

It follows that the judgment appealed from must be reversed, and case remanded, with direction to enter judgment for the plaintiff upon the verdict. So ordered.

PHILIP E. BROWN, J., took no part.

OIL WELL SUPPLY COMPANY v. GEORGE MAC MURPHEY.[1]

December 6, 1912.

Nos. 17,892—(90).

Contract by telegraph.

One Hukill residing in Pittsburgh, Pennsylvania, sent a telegram to the defendant, a resident of this state, reading: "Will you wire me that you will honor draft for $300?" Defendant telegraphed back, "I will." Thereupon Hukill presented draft for $300, drawn on defendant to Hukill's order, and the two telegrams, to plaintiff, which purchased the draft on the strength of the telegrams. *Held:* That the telegrams created an agreement on the part of defendant to honor the draft.

Evidence inadmissible.

As against plaintiff, the purchaser of the draft, defendant could not show that Hukill had failed to comply with the condition upon which defendant had consented to telegraph his agreement to honor Hukill's draft, there being no proof, or offer to prove, that plaintiff knew of the arrangement between Hukill and defendant.

Action in the district court for Big Stone county to recover $303.08 for breach of an alleged agreement to accept a sight draft. The answer denied the allegations of the complaint and prayed that the action be dismissed. The case was tried before Flaherty, J., who granted plaintiff's motion to direct a verdict in its favor for $366.

[1] Reported in 138 N. W. 784.

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From an order denying defendant's motion for a new trial, he appealed. Affirmed.

Ray G. Farrington, for appellant.

Cliff & Purcell, for respondent.

HOLT, J.

The action is for a breach of an alleged agreement to honor a draft. The court directed a verdict for plaintiff, and defendant appeals from an order denying him a new trial.

These are the uncontroverted facts: One Hukill, residing and doing business at Pittsburgh, Pennsylvania, applied to plaintiff to cash or buy a sight draft for $300 drawn by Hukill, payable to his own order, upon defendant, a relative of Hukill residing at Ortonville, Minnesota. Plaintiff promised to do so if defendant, by telegram, would agree to accept the draft. Thereupon, on the same day, to-wit, December 30, 1907, Hukill sent a telegram to defendant at Ortonville, reading: "Will you wire me that you will honor draft for $300?" The same day, in response to said message, defendant sent a telegram from Ortonville to E. M. Hukill at Pittsburgh, which reads: "I will." Hukill thereupon presented the draft and the two telegrams to plaintiff, which bought the draft, and in due course of business caused it to be presented to defendant for acceptance and payment. Defendant refused. When plaintiff learned this, it wrote defendant as follows:

"Oil Well Supply Co.,
"Pittsburgh, Pa.

"January 7, 1908.

"Subject, E. M. Hukill draft.

"Mr. Geo. MacMurphey,
"Ortonville, Minn.

"Dear Sir:

"On December 31st, we cashed for Mr. E. M. Hukill a sight draft drawn on you for $300, which has been returned to us under protest, marked 'payment refused,' the fees amounting to $3.08. We advanced said money on the strength of the telegram from you to Mr.

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Hukill, dated December 30th, reading 'I will,' which he told us was in reply to a telegram sent to you by him on December 30th, reading, 'Will you wire me that you will honor draft for $300?' We would like to know at once your reason for not honoring the draft; also whether or not your telegram reading, 'I will' was in answer to a telegram sent by Mr. Hukill to you as quoted above. Trusting to hear from you by return mail, and thanking you in advance,

"We remain,
"Yours truly,
"Louis Brown, Treas."

To this letter defendant appended this reply:

"Louis Brown,
"Dear Sir:
"I will say in reply to the above that my telegram 'I will,' was in answer to above telegram from Mr. Hukill on December 30th. I was out of funds myself and tendered a check from Mr. H. and it was not accepted, hence the protest. I presume this is all cleared up ere this.

"Yours truly,
"Geo. MacMurphey."

It seems to us that the two telegrams constitute a clear and definite contract on the part of defendant to honor a draft for $300. The manifest purpose of Hukill's telegram was to get defendant to agree to honor or accept a draft. It was not to ask for a telegram, except as a means of conveying an agreement or refusal to honor the proposed draft. There can be no doubt that plaintiff took the telegrams to be an agreement by defendant to honor the draft. Defendant appears to be an intelligent professional man, and it is safe to assume that he was not unacquainted with business methods. Hence he must have inferred from the telegram that Hukill wished to negotiate the draft on the strength of defendant's agreement to honor it. That defendant so understood the purport of the telegram admits of no doubt, when the subsequent correspondence between him and plain-

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tiff is considered. In construing written contracts, the meaning of the language employed, taken in its ordinary and popular sense with reference to the matter in hand, controls unless, when so viewed, an ambiguity still remains. If there be uncertainty after thus examining the agreement, the situation of the parties and the circumstances surrounding the transaction may be considered, in order to arrive at the true and intended meaning of the ambiguous expressions used. However, we cannot find any ambiguity in the telegrams constituting the agreement here, when applied to the subject matter. In contracts made by telegrams, the fewest possible words are used, and often omitted words in a message are to be supplied from the sense or context of a message to which it is an answer. This is so usual an occurrence in the business world that courts must take notice of the fact. Upon the undisputed facts, plaintiff was entitled to recover, and the court rightly directed the verdict, unless there was error in excluding certain evidence offered by defendant.

The defendant offered to prove that long prior to December 30, 1907, he had been in the habit of honoring drafts made upon him by Hukill; that during such time defendant was in possession of valuable stock pledged by Hukill to secure defendant against loss from such acceptances; that prior to said date, after he had surrendered this stock, Hukill requested defendant to honor further drafts, whereupon defendant stated he would not do so unless his, defendant's, financial condition at the bank at Ortonville was such that he could conveniently do so, and that Hukill should also again pledge with defendant the securities he before had; that he told Hukill not to draw any drafts on the defendant, until he had first wired to determine whether defendant would honor them; and that no such telegram or request should be sent to defendant, unless Hukill should, at the same time, place the said securities with defendant. And further that, when defendant received the telegram and he answered the same, it was with the expectation that the security would be sent him; that such security was not sent, and defendant was in such financial condition in his accounts at the bank that he could not conveniently honor the draft. We fail to see how the proffered proof could affect the plaintiff which bought the draft on the strength

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of the telegrams. Defendant did not offer to show that plaintiff had any knowledge of either the first arrangement under which defendant honored Hukill's drafts or this last one.

The order must be affirmed.

O. H. BAKKE v. BENEDIK MELBY.[1]

December 6, 1912.

Nos. 17,903—(73).

Alteration of note — verdict sustained by evidence.

In an action to recover upon a promissory note, the evidence is *held* to support the verdict upon the issue whether, subsequent to the delivery of the note, a material alteration thereof was made without the knowledge or consent of the maker.

New trial — failure to swear a juror — evidence.

To justify this court in reversing an order denying a new trial, and in ordering a new trial upon the ground that one of the jurors was not sworn as required by law, the fact that the juror was not sworn should affirmatively and clearly appear. Where, on the showing made, the question is left in doubt, the decision of the trial court will be treated as final.

New trial — assignments of error.

Numerous assignments of error considered and *held* not to present grounds for a new trial.

Two actions in the district court for Steele county, one to recover $217.55 and the other to recover $150, upon two promissory notes. The cases were tried together before Childress, J., and a jury which returned a general verdict in favor of plaintiff for $463.72, and to the special interrogatory whether the note of $350 was altered after defendant had delivered the note, answered no. From an order

[1] Reported in 138 N. W. 950.

Note.—The authorities on the question of alteration of date in a note are considered in a note in 32 L.R.A.(N.S.) 515.

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denying defendant's motion for judgment notwithstanding the verdict or for a new trial, he appealed. Affirmed.

Victor M. Petersen, for appellant.

Einar Hoidale and *H. L. Hoidale,* for respondent.

BROWN, J.

Two separate actions were brought by plaintiff against defendant to recover upon two promissory notes. They were consolidated and tried together in the court below, resulting in a verdict for plaintiff. Defendant appealed from an order denying his alternative motion for judgment or a new trial.

The making and delivery of the notes, one for $350, and one for $150, was admitted in defendant's answer. He pleaded in defense that the note for $350 had since its delivery been altered and changed in a material respect, was therefore void, and he demanded a recovery against plaintiff, as a counterclaim, the aggregate amount of several payments made thereon prior to the commencement of the action. The pivotal issue on the trial below was whether the note had been changed subsequent to its delivery, without the knowledge or acquiescence of defendant. The jury found that no such change had been made.

The short facts are: The parties to the action were practicing physicians, plaintiff being located at the village of Blooming Prairie, defendant at the village of Hayfield, this state. Some time in January, 1905, defendant purchased plaintiff's practice at Blooming Prairie, together with certain personal property, giving to plaintiff in part payment of the purchase price the promissory notes here in suit. The transaction was completed on January 17, 1905. The note for $350 was made out on the sixteenth, and was signed by defendant as maker, and one Moore as surety. As so made and signed it bore the date January 16. It was delivered the following day to a bank at Blooming Prairie for plaintiff. The date of the note as originally written, was either before or after its delivery, changed from the sixteenth to the seventeenth; there is no controversy on this point. The change was made by writing the figure "7" over the figure "6."

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The question submitted to the jury was whether this change and alteration was made before delivery of the note.

1. Our examination of the record leads to the conclusion that the evidence supports the verdict, to the effect that the alteration of the note was made with the knowledge of defendant, before the same was finally delivered in consummation or completion of the transaction. The record contains evidence tending to the opposite conclusion, but its force and effect were for the consideration of the jury and trial court. The strongest item of evidence tending to support defendant's contention is the condition of the collection register of the bank, where the note was entered as bearing the date January 16. This was not conclusive. The effect thereof was sufficiently overcome by the further evidence offered by plaintiff in the form of a special agreement made and entered into by the parties on the seventeenth, in the following language:

"Agency at Blooming Pra. Minn. 1/17/1905.

"It is hereby agreed that whereas I have made my promissory note of date Jan. 17—1905 for principal $350, due three years from date, also signed by E. E. Moore, said note is drawn up with 6% interest which is not the rate agreed to be paid, and I do hereby agree to pay interest upon said note at the rate of 8% from its date until fully paid.

"Benedik Melby."

There is no dispute about this special agreement, and defendant testified that it was read to him before he signed it, though he further testified that he did not notice that the writing described the note as bearing the date January 17. It was for the jury to say whether he in fact understood the contents of the writing. It was made and signed on the seventeenth at the time of and as the concluding part of the transaction. The date of the note must have been changed before the interest agreement was signed, for it expressly refers to the note as bearing date on January 17. This, in connection with the testimony of the cashier of the bank who had charge of the matter, is well nigh conclusive that defendant knew of the change in the note and consented to it. At any rate the question was one of fact.

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2. This brings us to the question whether any errors were committed on the trial of a nature to justify or require a new trial. A large number of assignments challenge the correctness of various rulings upon the admission or exclusion of testimony, and portions of the instructions to the jury. We have examined all these alleged errors and find no sufficient reason for reversing the order appealed from. It may be conceded that some of the rulings of the court were erroneous, but they were in respect to collateral issues and unsubstantial matters, and in no proper sense prejudicial. It would serve no useful purpose separately to refer to these assignments. We have considered them all with the result stated.

3. One of the attorneys for plaintiff was called as a witness on the trial, and was permitted over defendant's objection to relate a conversation had with defendant's attorney in respect to the alleged alteration of the note. This conversation occurred some two years prior to the commencement of the action. The court in its instructions called attention to this evidence, saying that it was proper for consideration by the jury in so far as it might throw light upon the question whether defendant consented to a change in the date of the note, but not for the purpose of showing a subsequent ratification of the change. Defendant had testified that he knew nothing about the change in the date of the note until about the time the action was brought against him, which was early in August, 1910. In contradiction of this testimony, plaintiff offered the conversation with defendant's attorney, which occurred in 1908. From this, plaintiff claimed that since defendant's attorney knew of the change in 1908, defendant must have been mistaken when he said that he first knew of it in 1910. This was clearly a collateral matter. There was no issue of ratification or subsequent acquiescence in the case. The sole issue was whether the change was made before the note was finally delivered to the bank on January 17, 1905. The mere fact that defendant may or may not have discovered the change at some subsequent date would have no particular relevancy to the real issue. We think the admission of the conversation between the attorneys was error. But it was not a matter of substance, and would require a strain to say that it was prejudicial to the rights of defend-

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ant. The court clearly directed the attention of the jury to the precise point in the case, namely, whether the date of the note was changed before delivery; saying, further, that a subsequent discovery and payments thereon with knowledge of the alteration would not amount to a ratification. It seems clear that the pointed instructions of the court removed any possible prejudice that might have resulted from the evidence referred to. That the jury was not misled is conclusively shown by the special verdict to the effect that the date of the note was changed before its delivery.

4. It is further claimed that one of the jurors impaneled to try the case was not sworn as required by law, or at all. The affidavits upon the subject leave the question whether the juror was sworn in some doubt. However, the matter was presented to the trial court, and its general order denying the motion for a new trial must be taken as a finding that the juror was sworn in proper manner; this precludes further inquiry by this court. To warrant this court in setting aside a verdict upon this ground, the failure to swear the juror should affirmatively appear, and be not left in doubt. Where, on the showing made, the question is left in doubt, the decision of the trial court will be treated as final.

This covers all that need be said. We discover no error of a nature to justify a new trial.

Order affirmed.

RUDOLPH STUHR v. WRIGHT COUNTY TELEPHONE COMPANY.[1]

December 6, 1912.

Nos. 17,934—(84).

Negligence — damages not excessive.

While the plaintiff was driving a threshing outfit on a highway, the

[1] Reported in 138 N. W. 693.

Note.—As to liability generally for injury or death of traveler coming in contact with electric wire in highway, see note in 22 L.R.A.(N.S.) 1169.

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smokestack of the engine came in contact with the wires of the defendant, suspended over the highway so low as to obstruct travel thereon, whereby he sustained personal injuries, for which he had a verdict for $2,450. Evidence considered, and *held*, that it sustains a finding that the defendant was negligent, that the plaintiff was not, and that the award of damages is not excessive.

Action in the district court for Wright county to recover $5,000 for personal injuries. The case was tried before Giddings, J., and a jury which returned a verdict in favor of plaintiff for $2,450. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

Latham, Pidgeon & Larson, for appellant.

Woolley & Johnson, for respondent.

START, C. J.

The plaintiff, on September 15, 1911, was driving on a public highway in the town of Marysville, in the county of Wright, with a threshing outfit, when the smokestack of the engine on which he was riding came in contact with the wires of the defendant suspended over the highway. He heard some one call out that he was against the wires. He stopped the engine at once, and went forward on the running board of the engine to investigate the situation, when the wires broke loose and threw him down, whereby he was injured to some extent. This is an action to recover damages for his injuries, on the alleged ground that they were caused by the negligence of the defendant in maintaining its wires so low over the highway as to obstruct and endanger travel thereon. The answer denied the alleged negligence, and alleged that the plaintiff's injuries were caused by his own negligence. The plaintiff had a verdict for $2,450, and the defendant appealed from an order of the district court of the county of Wright, denying its alternative motion for judgment or a new trial.

No claim is here made by the defendant that the evidence was not sufficient to sustain a finding that it was negligent as alleged, but it contends, in effect, that as a matter of law both the complaint and the evidence conclusively show that the plaintiff's injury was the re-

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sult of his own negligence. The contention is, in substance, that the plaintiff, when he stopped his engine, upon being told that he was against the wires, went forward from a place of safety to one of danger to investigate their condition; that he knew before he started forward that the wires were taut against the smokestack and pushed out of line, and liable to break any time and injure some one; and that he fully appreciated the hazard of the situation. While detached portions of the plaintiff's cross-examination seemingly furnish some basis for the contention, yet it is clear from his whole testimony, if credible, of which the jury were the judges, that he did not in fact know of the condition of the wires, or of any danger, when he started forward, and did not learn of it until he was within two feet of the smokestack.

His cross-examination as to where he was when he first learned that the wires were taut against the smokestack was this:

"Q. And after you saw how taut they were, you came to the conclusion it was dangerous for anybody to be around there; that they were liable to break at any time, and injure some one? A. Yes, sir. Q. And when you came to that conclusion, and saw the condition it was in, you were down in the position you occupied when you operated your engine? A. No, sir; I was on the platform by the side of the engine. When I noticed the wires were against the smokestack, I was standing on the platform by the side of the engine. Q. That is, when you noticed the condition of the wire that it was taut and dangerous? A. Yes, sir. Q. How far away were you when you noticed that condition? How far was the little platform on which you were standing from the wires on the smokestack at the time you saw and noticed it was in a dangerous condition? A. About two feet. Q. I think you said you thought it was liable to break at any time and tear the machine to pieces? A. Yes, sir. Q. And right in the face of that knowledge, and of that condition that it was liable to break at any time and tear the machine to pieces, you stepped up there and tried to loosen it? A. No, sir; when I seen it was in that dangerous condition— Q. Where were you then? A. I was on this little platform by the side of the boiler. Q.

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Two feet away from the wire? A. Yes, sir. Q. That is when you were about two feet from the wire? A. Yes, sir; I didn't know just how far, but I stepped back, or thought I would go back, and back up the engine to slacken the wires, so the men could take a fork and raise the wires over the stack. Q. When you saw the wires were so taut against the smokestack, you testified a moment ago that, when you saw that position, you were down on the platform where you operated the engine? A. No, sir; I was on the little platform on the side of the boiler. Q. You say that you heard Roberz or some one holler that the wires were caught? A. Something like that; I heard some one holler, 'Whoa!' Q. And you looked up from where you were, and saw the wires were against the smokestack? A. I couldn't see if they were against the smokestack or not."

It is perfectly obvious, in view of this testimony, that the plaintiff was not guilty of contributory negligence, and that the defendant was not entitled to an instructed verdict. Nor is it entitled to a new trial on the ground that the verdict is not sustained by the evidence.

The trial court instructed the jury that, in case they found for the plaintiff, they might, in assessing his damages, take into consideration any loss of time resulting directly from his injury. The defendant excepted to this instruction on the sole ground that loss of time was not pleaded, and the trial court, on plaintiff's motion, then allowed an amendment of the complaint in this respect. On the motion for a new trial, and here, the defendant assigned the giving of the instruction as error, and assigned the same reason stated in taking its exception on the trial. In its brief the defendant urges that the instruction was error for the further reason that there was no evidence of the value of the time lost. The defendant is limited to the ground relied on and urged in his exception and assignment of error in the trial court; for, having undertaken to advise the court of its specific objection to the instruction, and the court having obviated it by allowing an amendment to the complaint, it would be manifestly unfair to permit him here to urge for the first time another ground of error.

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We hold that the trial court did not abuse its discretion in allowing the amendment, and that the instruction was not reversible error.

The last contention is that the damages awarded are excessive, and appear to have been given under the influence of passion or prejudice. The evidence tends to show that the plaintiff is a farmer; that he fell against the wheel of the engine, breaking his rib, and seriously injuring his back and hip bone, causing him severe pain; that he was confined to his bed for two weeks, and has not been able to do any work since, as it hurts his backbone. There was also medical testimony to the effect that at the time of the trial there was a weakness of his hip, due to the injury, a possibility of nerves or tendons included in the callous, and that in time, with the hardening of the tissues, excruciating pain might result, and such condition might be permanent. A consideration of the whole evidence leads us to the conclusion that the award of damages was liberal, but not so excessive as to justify any interference with it by this court.

Order affirmed.

STATE v. WOLFGANG HAGER.[1]

December 6, 1912.

Nos. 17,949—(3).

Laying out highway — description bad.

The description of a public highway as contained in the petition and final order of the public authorities in proceedings to lay out and establish the same, set out in the opinion, is *held* so indefinite and uncertain as to render the highway proceedings a nullity.

Same — evidence inadmissible.

In a prosecution for the obstruction of a public highway, the state offered evidence tending to show that the locus in quo had been lawfully laid out as a public highway, and also evidence tending to show the establishment of a highway by user under the statute. The proceedings for laying out

[1] Reported in 138 N. W. 935.

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the highway by the public authorities were void for indefiniteness in the description of the road, and were erroneously received in evidence.

Judgment reversed.

It is *held*, since the record does not disclose whether the conviction of defendant was predicated upon the evidence tending to show a lawfully established highway by the public authorities, or upon a highway acquired by user, the latter not conclusively appearing from the evidence, that the judgment of conviction cannot stand and must be reversed.

Defendant was convicted in justice court of the offense of obstructing a certain highway by building and maintaining a fence therein. From the judgment sentencing him to a fine of five dollars and costs amounting to $50.57, and in default of payment to stand committed to the county jail, he appealed to the district court for Goodhue county upon questions of law alone. The appeal was heard by Hodgson, J., who affirmed the judgment of the justice. From the judgment affirming the judgment of the justice court and that the sureties on the appeal bond from the justice court should be liable for the amount of the judgment, if the judgment of the district court was not reversed, defendant appealed. Reversed.

Mohn & Mohn, for appellant.

William M. Ericson, County Attorney, and *F. M. Wilson,* for respondent.

Brown, J.

In this prosecution, commenced before a justice of the peace, defendant was charged with wrongfully obstructing a public highway. He was convicted before the justice and appealed to the district court, upon questions of law alone, where the judgment was affirmed. From the judgment of affirmance, defendant appealed to this court.

The state claimed on the trial before the justice, and offered evidence to substantiate the claim, that the highway alleged to have been obstructed by defendant had been (1) laid out and established as such by the public authorities and (2) if the proceedings had for that purpose were defective and ineffectual, that it had become a public highway by user under the statute, since it had been traveled and used by the public generally for the period of over thirty years

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prior to the date of defendant's alleged obstruction. The evidence tending to show that the highway had been lawfully laid out by the public authorities was all objected to by defendant, and the objections were sufficient to challenge the validity of the road proceedings. We first turn our attention to those proceedings.

The highway, if ever legally laid out, was in part a county and in part a town road; a part thereof having been attempted to be laid out by the board of county commissioners and a part by the town board. The objections to the proceedings had for this purpose related in the main to the description of the highway, as contained in the petition and the order establishing the road. The description as contained in the township proceedings was as follows:

"Commencing near the house of Eric Johnson in section 11, thence easterly through lands belonging to Charles Hahn in section 12, thence through lands of Gilbert in section 12, thence near the house of Johnson in section 13, thence through land of Barras in section 13, thence near the house of F. King in section 13, thence near the house of Andrew Fredrich to intersect the Wells Creek road."

This description is taken from the final order of the town board, which, in the above language, refers to the highway petitioned for. A survey and plat attached to the order does not aid much in definitely locating the highway, even if the record of the survey might be referred to for the purpose of curing the defect in description as contained in the petition and final order.

The proceedings before the county commissioners were had for the purpose of vacating an existing highway, or a part thereof, and to establish a new one connecting with the town road and extending thence beyond the town line. The petition, which was recorded in the minutes of the commissioners' proceedings, prayed for the vacation of an existing county road, which was described as follows:

"Commencing at the point where said road crosses the section line between sections 12 and 13 in said town of Hay Creek, and terminating where the same crosses the section line between section 13 in

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said Hay Creek and section 18 in said Florence, the same being a town line."

The petition contains nothing further to aid in locating the highway sought to be vacated, and in ordering a vacation the commissioners were guided necessarily solely by this description in the petition. This was followed by a prayer for the location of a new highway described as follows:

"Commencing on section line between section 12 and 13 in the town of Hay Creek at the point where the road, a portion of which is hereinbefore asked to be vacated, crosses said section line, thence east on said section line to the township line between the towns of Hay Creek and Florence, thence in a northeasterly direction until the same strikes the road running from the Military road to Wells Creek road in section seven in the town of Florence."

It is well settled by our decisions that a petition in proper form, definitely describing the proposed road, is essential to the jurisdiction of proceedings to lay out and establish a public highway, and that an accurate and definite description thereof is also essential to the validity of the final order of the town or county board, as the case may be. The order must in some manner describe the location of the road so definitely as to enable a "person conversant with such matters [to] trace it out on the ground." Sonnek v. Town of Minnesota Lake, 50 Minn. 558, 52 N. W. 961; 3 Dunnell, Minn. Dig. §§ 8459, 8461. It requires no particular discussion, within the rule, to demonstrate the insufficiency of either the petition or the order in the proceedings before the town supervisors. It is clear that the description there given was wholly insufficient to vest in the town board authority to act. The final order of the board contains the same description and is not materially aided by the survey and plat made a part of the order. No person with the description of the road as given in the petition or the order could trace the road upon the ground, and its termini (commencing near the house of Johnson, and ending at the Wells Creek road) afford no basis for a survey or plat.

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The order of the county board, though describing the road with some degree of certainty, entirely fails to describe the road sought to be vacated. It was held in Sheehan v. Board of Supvrs. of Bath, 80 Minn. 355, 83 N. W. 352, that a defect of this kind was fatal to the whole proceeding; the order laying the road, the court said, could not be upheld in part and repudiated in part. We discover no reason for departing from that decision.

It follows that the highway proceedings were fatally defective, that a highway at the locus in quo was not thereby legally established, and it was error to admit the proceedings in evidence. State v. Lindig, 96 Minn. 419, 105 N. W. 186.

But it is contended by the state that the error should be held without prejudice, since the evidence is practically conclusive of the establishment of a highway by user, under the statute on the line of that covered or attempted to be covered by the road proceedings. We are unable to concur in this contention.

The prosecution against defendant is criminal, not civil, and the rules guiding the trial of criminal actions must apply. State v. Cotton, 29 Minn. 187, 12 N. W. 529. The road attempted to be laid out was four rods wide. The alleged obstructions of which complaint is made, consisted of a fence claimed to have been constructed by defendant along and parallel with the road, which at one or more points encroached upon the traveled track of the road. It may be conceded that the evidence would justify a finding that a public road was acquired at the point in question by public use. But it does not follow that it was four rods wide. On the contrary, our decisions, prior to the passage of chapter 152, p. 155, Laws 1899, limited the highway so acquired to the character and extent of the user. Arndt v. Thomas, 93 Minn. 1, 100 N. W. 378. The statute referred to can have no retroactive operation, and cannot be held to apply to the highway in question, for it became established long prior to the passage of the statute. Gilbert v. Village of White Bear, 107 Minn. 239, 119 N. W. 1063. The highway in question, conceding it to have been established by user, must then be limited to the character and extent of the public use. The evidence presented in the record leaves the question of the precise location of the road as traveled

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and used in former years in some doubt, at least as to certain points between its termini. It appears to be a "crooked road," and has shifted in recent years. Defendant's fence encroaches very nearly to, if not actually upon, the traveled track at one point, but does not interfere with travel at any other point.

Now, the important inquiry is: Upon what did the justice and the learned district court rely in support of the judgment of conviction? Did they proceed upon the theory that the highway in question was four rods wide, as the town or county board attempted to lay it, or upon the theory that the road as acquired and established by user was encroached upon and obstructed? The question cannot be answered from the record. If the decision below was based upon a legally established highway four rods wide, the court was entirely right, for it conclusively appears that defendant's fence was within the boundaries of the same, for its entire length. But the judgment of conviction cannot stand upon that foundation for, as we have held, no highway was ever legally laid out. If, however, the foundation of the conviction was a highway by user, then it might be sustained, if the evidence made it clear that the alleged obstruction was placed there by defendant or by his direction, and upon a part of the highway so acquired. The evidence upon this question is not free from doubt, though we deem it sufficient to charge defendant with responsibility for the fence, though it is not conclusive. And since there was error in the reception of the highway proceedings, and it cannot be ascertained from the record whether the court predicated its decision upon the evidence so erroneously received or upon that properly received, there must be a reversal.

We have often applied this rule in civil actions. Moldenhauer v. Minneapolis Street Ry. Co. 80 Minn. 426, 83 N. W. 381; Peterson v. Chicago, M. & St. P. Ry. Co. 36 Minn. 399, 31 N. W. 515. There is a stronger reason for its application in a criminal prosecution where the guilt of defendant must be shown beyond a reasonable doubt.

A reversal does not necessarily amount to a final determination that defendant may rightfully maintain his fence so as to obstruct this highway, as established by the public use. If the highway is

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thus obstructed, the maintenance of the fence constitutes a continuing obstruction, and a new prosecution may be maintained. We may say also, in conclusion, that the proper proceeding in prosecutions of this kind, where the title to real estate becomes involved, is pointed out in State v. Sweeney, 33 Minn. 23, 21 N. W. 847.

Judgment reversed.

ABRAHAM JUNTTI v. OLIVER IRON MINING COMPANY.[1]

December 6, 1912.

Nos. 17,965—(66).

Negligence — complaint sufficient.

The complaint alleges in effect that the defendant left unguarded large quantities of carbide, a dangerous substance and attractive to children of tender years, on its premises near a public street, knowing that such children were accustomed to pick up the carbide, pour water upon it, whereby gas was generated, and then explode it by applying a light; that the plaintiff's son, five years old, secured some of the carbide so left by defendant, put it in a can, poured water on it, and in attempting to light the gas an explosion followed, whereby he was seriously injured. *Held*, that the complaint states facts sufficient to constitute a cause of action.

Action in the district court for St. Louis county by Abraham Juntti, for the benefit of his minor son, to recover $5,000 for per-

[1] Reported in 138 N. W. 673.

Note.—The authorities on the doctrine of "attractive nuisance" are collated in an elaborate note in 19 L.R.A.(N.S.) 1094 and in a supplemental note in 20 L.R.A.(N.S.) 903.

As to liability for injury to children from explosives left accessible to them, see notes in 14 L.R.A.(N.S.) 586 and 24 L.R.A.(N.S) 1257.

As to duty to guard against injury to trespassing children by fire, see note in 39 L.R.A.(N.S.) 1058.

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sonal injuries. From an order, Dancer, J., overruling defendant's demurrer to the complaint, it appealed. Affirmed.

Paul H. Welch, for appellant.

William E. Culkin and *John E. Samuelson,* for respondent.

START, C. J.

This is an appeal from an order of the district court of the county of St. Louis overruling the defendant's demurrer to the complaint.

The action was brought by the plaintiff, for the benefit of his minor son, who, at the time of his injury by the alleged negligence of the defendant, was between five and six years old. The complaint, so far as here material, alleges in substance that at the times therein stated the defendant was engaged in the mining of iron ore at the city of Eveleth, this state, and used for the purpose of artificial lighting a substance known as carbide, which, when used in connection with water, produces vapors and gases of a highly inflammable character, and, when brought in contact with fire in any way, will explode, and is a highly and extremely dangerous substance. It is also, by reason of the gases and vapors that form from it when coming in contact with water, and the fact that, when fire is communicated to such gases in any way, it will burn and explode, highly attractive, alluring, and tempting to children of tender years, and extremely dangerous to them. Such children were in the habit of picking up the carbide so left exposed and unguarded, which they would place in cans and pour water upon for the purpose of producing gases, to the end that fire might be communicated to it whereby explosions would be created, all of which was well known to the defendant prior to the injury of the plaintiff's minor son. On and prior to October 6, 1911, the defendant carelessly and negligently allowed large quantities of carbide to be thrown and left by its employees upon its premises, and also in, upon, and near a public street of the city, wholly exposed and accessible to children of tender years, without guard of any kind, which was easily observed by them when in the street for play. On October 6, 1911, the plaintiff's minor son and a comrade of about his own age were playing in the street, and picked up a sheet iron can, which they there found, placed therein

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a quantity of the carbide, so left exposed and unguarded by the defendant, and poured water into the can. As the water came in contact with the carbide, gases and vapors were generated, and, for the purpose of seeing the flame that would be produced, and of hearing the noise from the explosion which would be produced, by igniting such vapors and gases, and by reason of the youth and inexperience and want of judgment of plaintiff's minor son, he lit a match and attempted to light the gases, when suddenly a terrific explosion followed, throwing him into the air, burning his head, face, hands, and body, and otherwise injuring him.

The defendant here urges in support of its demurrer that the complaint fails to show any negligence on the part of the defendant, or any act on its part which was the proximate cause of the injury of plaintiff's son, and, further, that the complaint affirmatively shows that the plaintiff was guilty of contributory negligence. It is claimed in this connection, in effect, that the defendant's alleged acts in allowing large quantities of carbide to be thrown and left exposed and unguarded upon the premises, and on and near the public street, were neither negligent, nor the proximate cause of the injury to the child, because it appears from the allegations of the complaint that carbide is only dangerous when gases are formed by the action of water thereon, and when brought in contact with flame, and that the proximate cause of the injury was not any act of the defendant, but that of the child in pouring water upon the carbide and attempting to light the gases thereby generated.

This claim must be considered in connection with the allegation of the complaint to the effect that the defendant knew, prior to the accident, that children were accustomed to pick up the exposed carbide, pour water upon it, and explode the gas by lighting it. It is quite obvious that the defendant was guilty of negligence, if the allegations of the complaint be true, in leaving large quantities of carbide exposed and unguarded, for it is clear from such allegations that it ought, in the exercise of ordinary care, to have anticipated that children of tender years were liable to be injured thereby, especially so in view of its actual knowledge in the premises. We are unable to discern any difference in principle between the case made

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by the allegations of the complaint herein and the cases of Mattson v. Minnesota & North Wisconsin R. Co. 95 Minn. 477, 104 N. W. 443, 70 L.R.A. 503, 111 Am. St. 483, 5 An. Cas. 498, and Vills v. City of Cloquet, supra, page 277, 138 N. W. 33.

In the last case cited the defendant was charged with negligence in storing explosive fuse caps, without taking sufficient precautions to prevent children from getting possession of them. The plaintiff's son, a child of tender years, got possession of one of the caps and proceeded to hammer it with a stone to flatten it out, when it exploded and injured him. It was held that the alleged negligence of the defendant and the proximate cause of the child's injuries were questions for the jury.

See, also, McDowell v. Village of Preston, 104 Minn. 263, 116 N. W. 470, 18 L.R.A.(N.S.) 190, and Froeberg v. Smith, 106 Minn. 72, 118 N. W. 57.

It is obvious that the complaint in this action does not show, as a matter of law, that the plaintiff or his child was guilty of contributory negligence. It follows that the complaint states facts sufficient to constitute a cause of action.

Order affirmed.

ETTA M. AMES v. A. T. BRANDVOLD.[1]

December 6, 1912.

Nos. 17,967—(137).

Judgment on the pleadings — construction of complaint.

In deciding whether a complaint states a cause of action when the question is raised for the first time at the trial on a motion for judgment on

[1] Reported in 138 N. W. 786.

Note.—As to liability of landlord generally for injury to tenants from defects in premises, see note in 34 L.R.A.(N.S.) 798.

As to liability of owner for injury to tenant's guests or employees by defect in premises, see note in 17 L.R.A.(N.S.) 1161.

As to liability to trespasser or bare licensee from active as distinguished from passive negligence, see note in 36 L.R.A.(N.S.) 492.

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the pleadings, plaintiff is entitled to every intendment and inference which a jury might legitimately draw from its allegations, and the motion should be denied if the complaint can be sustained by the most liberal construction.

Liability of landlord for defect in leased premises.

If, at the time of a lease, the demised premises are in a defective and dangerous condition which is known to the landlord, and concealed from the tenant, the former is liable to the tenant or his licensee who, without negligence on his part, is injured by reason of such dangerous condition, although the landlord does not covenant to make repairs.

Complaint construed.

Complaint in this case construed, and *held*, as against an objection raised for the first time on a motion for judgment on the pleadings, to state a cause of action.

Action in the district court for Rice county to recover $10,000 for personal injuries. Defendant's motion for judgment on the pleadings was granted by Childress, J. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Reversed.

Robert Mee, for appellant.

Thomas H. Quinn, for respondent.

BUNN, J.

This is an action to recover for personal injuries sustained by plaintiff while a guest of a tenant of defendant. Defendant interposed an answer, which was, in substance, a general denial. The court, on defendant's motion, granted judgment on the pleadings, and from the judgment entered on this order plaintiff appealed.

The question here is whether the complaint states a cause of action, under the very liberal rules of construction that must be adopted when the objection is raised for the first time on the trial, on a motion for judgment on the pleadings. There is no doubt that on such a motion, plaintiff is entitled to every intendment and inference which a jury might legitimately draw from the allegations of the complaint. The test is not whether a demurrer would be sustained. The motion should be denied, if the complaint can be sustained by the most liberal construction. 2 Dunnell, Minn. Dig. § 7694, cases in note. This clearly ought to be the rule; a judgment

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on the pleadings may foreclose the plaintiff absolutely, though he in fact have a good case, while a ruling against the complaint on a demurrer is not ordinarily final, because of the right usually granted plaintiff to amend.

The complaint in substance is as follows: Defendant owns a lot in Faribault, on which he maintains a dwelling house and appurtenances, including an outhouse. During all the times mentioned in the complaint, this lot, house and appurtenances were and are leased to a tenant, who occupies the premises as a home. The outhouse was placed over a deep excavation, an abandoned well, contrary to an ordinance of the city. Defendant carelessly and negligently allowed the timbers supporting the floor to become rotten and unsafe, and carelessly and negligently failed to repair the same. These timbers were concealed from view, and the rotten and unsafe condition thereof could not be discovered by persons using the outhouse. Plaintiff was a guest of the lessee, and in using the outhouse, the floor gave way, owing to the rotten condition of the timbers supporting it. Plaintiff thereby sustained injuries for which she seeks to recover damages in this action.

The trial court held that in the absence of allegations of an agreement by the landlord to repair, or that he knew of the dangerous trap on the premises and concealed its existence from the tenant, the complaint stated no cause of action. The proposition is well settled in this state, as it is elsewhere, that where there is no agreement by the landlord to repair the demised premises, and he is not guilty of any fraud or concealment as to their safe condition, and the defects in the premises are not secret, but obvious, the tenant takes the risk of their safe occupancy, and the landlord is not liable to him or to any person entering under his title or by his invitation, for injuries sustained by reason of their unsafe condition. Harpel v. Fall, 63 Minn. 520, 65 N. W. 913; Wilkinson v. Clauson, 29 Minn. 91, 12 N. W. 147; Krueger v. Ferrant, 29 Minn. 385, 13 N. W. 158.

We have no desire to depart from the doctrine of these cases, but their authority should be confined to the principles they decide, and not extended. For instance, when there is an agreement by the landlord to repair, he is liable for injuries caused to the tenant or

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his licensee by reason of a defective condition of the demised premises. Barron v. Liedloff, 95 Minn. 474, 104 N. W. 289; Good v. Von Hemert, 114 Minn. 393, 131 N. W. 466. So also where the landlord demises premises with a nuisance upon them, "he is presumed to authorize its continuance, and is liable to third persons subsequently injured thereby. For example when a house is in such a ruinous condition at the time of the demise that it subsequently falls upon and injures an adjacent building, or persons or property lawfully therein, he is liable for the injuries." Start, C. J., in Harpel v. Fall, supra. This is substantially the "concealed trap" doctrine and has abundant support both in reason and authority. If there is a concealed danger on the premises known to the landlord and unknown to the tenant at the time of the lease, the landlord is liable to the tenant or to his licensees who may without negligence be injured thereby, though the landlord does not covenant to make repairs. Kayser v. Lindell, 73 Minn. 123, 75 N. W. 1038; 24 Cyc. 1114; Moore v. Parker, 63 Kan. 52, 64 Pac. 975, 53 L.R.A. 778, and Coke v. Gutkese, 80 Ky. 598, 44 Am. Rep. 499, are cases in their facts very similar to the case at bar, in which the above doctrine was applied.

If therefore, in the instant case, the complaint can reasonably be construed as alleging the dangerous condition of the premises at the time of the lease, and that this was concealed from the tenant, it states a cause of action. It is alleged that the outhouse was placed over a deep excavation, that defendant allowed the timbers supporting the floor to become rotten and neglected to renew or repair the same, though he knew or should have known they would soon become "decayed, rotten, and weakened." It is alleged that these timbers were concealed from view, "that the condition thereof could not be discovered by a person ordinarily using the same," and that the place was a "concealed and dangerous trap." It is not clear that the pleader intended to allege that the conditions were known to the landlord and concealed from the tenant at the time the lease was entered into. But as against a motion for judgment on the pleadings, we think the complaint may fairly be so construed. It appears that there had been a trial of the case resulting in a verdict for plain-

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tiff, and that the trial court granted a new trial. It is very likely that, in granting the subsequent motion for judgment on the pleadings, the decision was influenced by the court's recollection of the evidence on the former trial. We have not the benefit of this knowledge, and of course could not use it if we had. The case must be decided here, as it should have been below, solely on the complaint, and giving the pleader the benefit of every intendment and inference which a jury might legitimately draw from its allegations. It may appear on a trial that no case can be made, but we think the complaint is, as against this motion, sufficient to permit the introduction of evidence which would make a case for a jury. Even if it should be determined that any particular item of evidence was inadmissible under its allegations, there is always the chance that plaintiff may be permitted to amend his pleading so as to make the evidence admissible.

Judgment reversed.

SAM TAYLOR v. FIRST NATIONAL BANK OF MINNEAPOLIS.[1]

December 6, 1912.

Nos. 17,980—(260).

Pleading — allegations that payment of check was stopped.

The answer of a bank to a suit brought by the payee of a check, drawn on ample funds on deposit, averred that, before the check was presented for payment, the drawer notified the bank that the check was without consideration and was obtained by fraud, and directed the bank not to pay the same,

[1] Reported in 138 N. W. 783.

Note.—As to liability of bank for refusing payment of check, when it has funds, see note in 15 L.R.A. 134.

As to right to stop payment of check, see note in 30 L.R.A. 845.

Action by drawee essential to terminate drawer's right to stop payment of check, see note in 39 L.R.A.(N.S.) 655.

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and that during all the time that the drawer had had funds on deposit, and long prior thereto, the custom and usage prevailed, among banks and their depositors in the city and state where were all the parties, that before a check is presented for payment the drawer has the right to revoke the authority of the bank to pay, *held* not demurrable.

Action in the district court for Hennepin county to recover $10 upon a check drawn upon defendant bank. From an order, Waite, J., overruling plaintiff's demurrer to the answer, he appealed. Affirmed.

Eugene Bryan and *F. E. Clinite,* for appellant.

Lancaster, Simpson & Purdy, for respondent.

HOLT, J.

The complaint alleges and the answer admits the execution and delivery of the check, its indorsement and presentment for payment by plaintiff, and the refusal of the defendant bank to pay, although it had sufficient funds of the drawer on deposit with which to pay. The answer by way of defense alleges that the drawer of the check, before plaintiff presented the same to the bank for payment, ordered payment stopped, and directed defendant not to pay the same, on the ground that plaintiff obtained it from the drawer by fraud and without consideration. It is also averred that at the time the check was drawn, and for a long time prior thereto, a custom and usage prevailed between the banks and their depositors throughout the state that a bank withhold and refuse payment of a check, drawn for a part of the amount on deposit, whenever the drawer thereof notified the bank so to do prior to the presentation of the check for payment.

This court, in Wasgatt v. First Nat. Bank of Blue Earth, 117 Minn. 9, 134 N. W. 224, held that a check is a pro tanto assignment of the funds of the drawer on deposit with the drawee bank, so that, if the bank refuses payment when it has sufficient funds of the drawer on deposit, the payee may maintain an action against the bank upon the check. Plaintiff insists that it necessarily follows that the drawer cannot stop payment, or revoke the authority of the bank to pay, for as far as he is concerned the money belongs to the

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payee. We do not think the decisions of this court point to the conclusion contended for by appellant, nor do those of any other court committed to the doctrine that a check is an assignment pro tanto of a depositor's funds, unless it be that of Illinois. We are now speaking of a check in the hands of the payee, and not of one that has in due course of business been transferred to a bona fide holder for value. It is manifest that the execution and delivery of a check to the payee does not, of itself, transfer the amount of the deposit represented by the check to the payee, so that without more the bank holds the funds for the payee. Therefore, the courts which have adopted the rule that a check is a pro tanto assignment of the drawer's funds, also recognize the fact that the assignment does not become fully consummated until the check is presented for payment. Before that is done, the depositor may in various ways make nugatory the tentative assignment made by the check against the funds on deposit. For instance, he may go to the bank before the check drawn by him is presented and withdraw the whole deposit, or he may have exhausted the same by subsequent checks presented and paid before the one upon which the right to hold the bank is sought. In the decision in Wasgatt v. First Nat. Bank of Blue Earth, supra, it is clearly intimated that, between the execution of a check and its presentment for payment, occurrences may intervene to prevent the consummation of the assignment. This is in line with the language of the court in Northern Trust Co. v. Rogers, 60 Minn. 208, 62 N. W. 273, wherein the status of the bank with relation to a check holder is thus stated:

"Before demand for payment no assignment exists, no obligation has been created, no privity has grown up, and the very right of the bank to pay may be taken away by any one of a great number of occurrences; that the act of presentment and demand, before any of these occurrences has taken place, is that which creates at once, by the usage of business and understanding of all concerned, the obligation, the privity, and the appropriation, or at least the right to claim an appropriation."

In the well considered case of Raesser v. National, 112 Wis. 591, 88 N. W. 618, by a court which, prior to the enactment of the uni-

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form negotiable instruments law, adopted and adhered to the same rule as this court in the Wasgatt case, supra, it is said that, if a bank is notified by the drawer of a check not to pay because the payee therein procured it without consideration or by fraud, the bank pays at its peril. In Weiand's Administrator v. State, 112 Ky. 310, 65 S. W. 26, 56 L.R.A. 178, the court concludes that there "is no good reason why, as between the immediate parties to the check (where innocent parties are not affected) the drawer may not revoke or countermand" a check. And neither do we see any good reason for either a rule of business, or law, which will throw the risk upon a depositary or bailee holding a fund under a contract or obligation with the depositor alone to determine at his peril who is entitled to part thereof, after notice from the depositor that the instrument by which another claims the right to such part is for some reason invalid.

Nor can it be said that by the decisions in this state, or by deductions therefrom, it is settled law that the drawer of a check may not, before the same is presented for payment, revoke the bank's authority to pay; hence, there is nothing to prevent the business custom and usage pleaded in the answer from controlling the disposition of the case. The general custom and usage according to which a business, as for instance that of banking, is carried on in a state becomes in the nature of a law pertaining thereto, so that parties may be said to contract with reference to it. Clarke v. Hall & Ducey Lumber Co. 41 Minn. 105, 42 N. W. 785. Mr. Justice Mitchell, in Northern Trust Co. v. Rogers, supra, with regard to the matters here involved, suggests "that this entire question is one which should be determined more upon considerations of business usages and business policy than of mere theoretical knowledge."

Applying the rule indicated, the solution is clear, for the answer alleges that the custom and usage prevails between all banks in the state, including the city wherein is defendant's bank, and their depositors that, before a check is presented for payment, the drawer has the right to stop payment thereof. Since a depositor of a bank may at any time, by drawing out his whole deposit, prevent payment of a check previously drawn by him, so that no claim whatever could be made by the payee against the drawee bank, we apprehend

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no inconvenience or injustice will result from a recognition by the court of the business usage pleaded in the answer and admitted by the demurrer. The practice and usage pleaded become part of the legal contract or obligation between the depositor and the bank under which the funds deposited are to be paid out, so that the checks drawn against the deposit necessarily become subject thereto, at least so long as such checks remain in the hands of the payees.

The defendant asks us to go further and determine that a depositor may stop payment of a check after it has passed into the hands of a bona fide innocent holder. We deem it inexpedient to discuss or determine that question on this appeal, for it is not involved in the demurrer.

This cause having been set down for oral argument in violation of rule XV, no costs will be allowed.

Order affirmed.

P. D. SCANNELL and Another v. ALBERT P. HENDRICKSON.[1]

July 19, 1912.

Nos. 17,656—(207).

New trial — finding — conflict in testimony.

A finding of the trial court that attorneys were to receive a reasonable compensation, and such value was $250, will not be disturbed upon appeal, because there may be some conflict in the testimony. [Reporter.]

Respondents filed a claim for $250 in the probate court for Ramsey county for services rendered as attorneys. The probate court allowed the claim in the sum of $50. Respondents appealed to the district court for that county, where the case was tried before Dickson, J., who made findings and conclusions of law as set forth in the opinion. From an order denying Albert P. Hendrickson, Jr.'s, motion for a new trial, he appealed. Affirmed.

Halbert & Halbert, for appellant.

W. R. Duxbury and *P. D. Scannell*, pro se.

[1] Reported in 137 N. W. 1.

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PER CURIAM.

P. D. Scannell and W. R. Duxbury filed a claim for attorneys' fees and disbursements in the probate court of Ramsey county against the estate of Albert P. Hendrickson. The probate court allowed the claimants $50. They appealed to the district court, and for complaint therein alleged that the estate was indebted to them for a balance due upon an account for professional services rendered between April 1, 1909, and December 1, 1910, in an action pending in the district court of Washington county, Minnesota, entitled "Forest Lake State Bank v. P. S. Ekstrand, P. A. Scannell, and Albert P. Hendrickson," which action was appealed to the Supreme Court, and for services rendered therein (Forest Lake State Bank v. Ekstrand, 112 Minn. 412, 128 N. W. 455), to the sum of $250 and expenses incurred on behalf of the decedent in the sum of $35.25. The answer was a general denial. The trial without a jury resulted in findings to the effect that Albert P. Hendrickson, during his lifetime, employed P. D. Scannell and W. R. Duxbury as attorneys to defend in the above-mentioned action: that they so did; that afterwards said Albert P. Hendrickson died, and his estate was administered in probate court; that said attorneys duly filed their claim for said services therein, which was allowed at $50; that said Albert P. Hendrickson agreed to pay the reasonable value of the attorneys' services; that such value was $250; and that expenses incurred by them in the case were $35.25. The conclusion of law was that the appellants in the district court were entitled to judgment against the respondent therein, as administrator of the estate of Albert P. Hendrickson, in the sum of $285.25, together with costs and disbursements. From an order denying a new trial, the administrator appeals to this court, and assigns as errors that the findings of fact are not supported by the evidence.

As we understand counsel for appellant, respondent in the district court, the fact that respondents herein carried on the litigation mentioned as the ostensible attorneys for P. A. Scannell and Albert P. Hendrickson is not controverted. No testimony was offered to show that the services rendered or disbursements incurred were of less value than the amount the court found. But the administrator contends that P. D. Scannell, one of the attorneys, went with Albert P. Hendrickson, deceased, into the venture which resulted in the litigation, upon the agreement and understanding that Scannell should do all the legal work necessary without cost to Hendrickson, that P. D. Scannell was the real party in interest, and that P. A. Scannell was a nonentity, or a name adopted by P. D. Scannell for his own purpose in the transaction, and the lawsuit resulting therefrom with Ekstrand. While the cross-examination of P. D. Scannell lends strong color to this contention, it is not to be overlooked that Albert P. Hendrickson, in his lifetime, was called as a witness in said bank lawsuit, and testified that his partner in the Ekstrand purchase was not P. D. Scannell, the attorney, but his god-daughter, Patricia A. Scannell. Mr. Duxbury, one of the respondents, testified that Mr. Hendrickson, Ekstrand, and P. D. Scannell employed him

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to assist P. D. Scannell in trying the case, and that he so did in both courts; that Hendrickson, when defendants lost in the district court, instructed Duxbury to appeal. Hendrickson died before the appeal was submitted, but Duxbury claims he did not know of the death till some time after he argued the cause in this court.

The only evidence negativing the presumption that the attorneys were to receive reasonable compensation for their services, regardless of the outcome, is some casual remark made by Hendrickson, while living, to one Bohrer, with reference to the bank litigation, that if Scannell "wins he gets half, and if he don't I am nothing out," and a statement to his son, the administrator, "that Mr. Scannell was going to have half of the thing for the legal end of it." No special contract of employment was pleaded in the answer, and, even if so, the evidence supports the finding that the deceased employed the respondents on the implied promise to pay the reasonable value for the services rendered. For this court to disturb such finding, because there may be some conflict in the testimony, would be an unauthorized usurpation of the functions of the trial court.

Order affirmed.

MARY KENNEDY v. W. D. KELLY.[1]

July 19, 1912.

Nos. 17,698—(201).

New trial.

Where the evidence was conflicting as to the mental capacity of testator, and on the question whether the alleged will was executed as required by statute, the court reversed the lower court and granted a new trial in the interest of justice. [Reporter.]

To the will of Catherine Myler, propounded by William D. Kelly to the probate court for Ramsey county for allowance, Mary Mullaney, Maurice J. Dore, Johanna Grace and Mary Kennedy filed objections. The will was allowed by the court and Mary Kennedy appealed to the district court for that county from the order admitting the will to probate. The appeal was heard by Hallam, J., who made findings and affirmed the order of the probate court. From the order denying contestant's motion for a new trial, she appealed. Reversed and new trial ordered.

W. B. Douglas and *Kennedy & Kennedy*, for appellant.

Thomas C. Daggett, for respondent.

[1] Reported in 137 N. W. 456.

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PER CURIAM.

An instrument purporting to be the will of Catherine Myler was presented for probate and allowance to the probate court of Ramsey county. Mary Kennedy, an adopted daughter of deceased, Mary Mullaney, a sister, Maurice J. Dore, a nephew, and Johanna Grace, a niece, filed objections to the probate of the instrument on the grounds that it was not duly executed, want of testamentary capacity, and undue influence. The probate court admitted the will. The objectors appealed to the district court, where the issues were tried by the court without a jury, and a decision made affirming the order and judgment of the probate court. The objector Mary Kennedy appealed to this court from an order denying a motion for a new trial.

We have carefully considered the evidence, and reach the conclusion that the interests of justice will be best served by another trial. While the testimony is to a large extent conflicting, both on the question of the mental capacity of the alleged testator, and on the question of whether the instrument was fully executed as required by statute, there is so much in the record to indicate the physical and mental incapacity of Mrs. Myler, such a lack of a good reason for disinheriting her adopted daughter, and so much doubt whether the instrument was legally executed, that we feel that the case should be tried again.

Order reversed, and new trial granted.

STATE BOARD OF LAW EXAMINERS v. C. D. BENSEL.[1]

October 11, 1912.

Nos. 17,749—(16).

Attorney at law suspended for misconduct.

Attorney suspended from practice in the courts of the state for one year, because of wilful misconduct in inserting grossly libelous charges in complaints in three actions for slander against the defendants therein. [Reporter.]

The State Board of Law Examiners in its complaint charged C. D. Bensel with wilful misconduct in his profession of attorney at law. The facts are stated in the opinion. The evidence tended to show that the paragraph referred to in the opinion was inserted in the complaints mentioned at the request of defendant's client, who gave him the names of witnesses by whom she asserted she could prove the matters alleged. Ordered that defendant be suspended from his office as attorney and counselor at law in the courts of this state for the period of one year.

[1] Reported in 137 N. W. 1115.

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Frank L. Clift, president of State Board of Law Examiners, for complainant.
C. D. Bensel and *Stevens & Stevens*, for respondent.

PER CURIAM.

Application of the State Board of Law Examiners for the removal of C. D. Bensel from his office as attorney and counselor in the courts of this state.

The charge against respondent is wilful misconduct, wilful violation of his oath and of the duties imposed upon him as an attorney and counselor. The specific charge was that respondent commenced for a client three actions in the district court for Chippewa county against three separate women, in each of which actions it was sought to recover damages for slander. In each complaint, respondent caused to be inserted a paragraph containing grossly libelous charges against each of the defendants, which matters so inserted were wholly irrelevant to any issue in the case, and were alleged to have been wilfully and maliciously inserted by respondent.

After a careful consideration of the evidence as reported by the referee, and the arguments of counsel, we find respondent guilty of wilful misconduct as charged.

It is therefore ordered that respondent C. D. Bensel be and he is hereby suspended from his office as attorney and counselor at law in the courts of this state for the period of one year from the filing of this order.

HARVEY S. JUSTICE and Another v. F. L. PARSHALL and Another.[1]

October 25, 1912.

Nos. 17,773—(50).

Verdict sustained by evidence.

Action to recover the price of a carload of potatoes. Counterclaim that plaintiffs were indebted to defendant for advances on other cars made by him as produce broker. Verdict in favor of defendant for $250. *Held:* There was ample evidence to support the verdict, and there were no reversible errors. [Reporter.]

Action in the municipal court of Minneapolis to recover $383.98, proceeds of a sale of a carload of sweet potatoes. The answer set up six counterclaims against plaintiffs in other shipments to defendant, a fruit and produce broker, and alleged that in each of those shipments plaintiffs drew their draft upon him for the amount specified, which he paid prior to the delivery of each car as an advance

[1] Reported in 137 N. W. 1116.

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against the final net proceeds of the contents of such car when finally sold by defendant, under an agreement to repay defendant any difference between the advance and the actual proceeds, that the actual proceeds did not equal the advances, and demanded judgment for $231.81. The reply denied that the respective carloads of sweet potatoes, as set forth in the counterclaims, were ever consigned to defendant on a brokerage basis by agreement or otherwise; that plaintiffs ever agreed to remit or recoup to defendant any amounts of any kind or nature from the purchase price of any of the cars, but alleged that the cars were sold and delivered directly to defendant, by virtue of an agreement mutually agreed upon between the parties, by the terms of which contract title to the respective cars passed immediately to defendant upon payment of the purchase price. The case was tried before Leary, J., and a jury which returned a verdict in favor of defendant for $250.53. From an order denying plaintiffs' motion for a new trial, they appealed. Affirmed.

Henry Deutsch, Breding & Fligelman and *Walter S. Whiton*, for appellants.

Stiles & Devaney, for respondent.

PER CURIAM.

The question presented to the court below in this case was one of fact, namely, whether in the transaction involved in the action defendant was acting as a broker for the sale of plaintiff's property, or whether he purchased the property outright. The jury solved the question in defendant's favor. Our examination of the record discloses ample evidence to sustain the verdict. There were no reversible errors in the rulings of the court or in its instructions to the jury.

Order affirmed.

CHARLES DAHLBERG v. LENA JOHNSON and Another.[1]

October 25, 1912.

Nos. 17,932—(48).

Boundary.

The decision was supported by the findings of fact. [Reporter.]

Action in the district court for Lyon county to determine the location of a certain boundary line. The separate answers admitted that plaintiff's land adjoined defendants' land on the north and alleged that defendants and their grant-

[1] Reported in 137 N. W. 1115.

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ors had, during all the time for the past thirty years, been in the actual, open, continuous, adverse, hostile and exclusive possession, with the intention to claim adversely to plaintiff, and all others, all the land lying south of the line extended practically east and west through the quarter post established by the United States government on the north line of section 4, township 108, north of range 43 west, and during all of said period had exclusively farmed, worked and cut the hay on the same. The case was tried before Olsen, J., who made findings locating the boundary line between plaintiff and defendants and ordered judgment accordingly. From the judgment entered pursuant to the findings, plaintiff appealed. Affirmed.

Robinson & English, for appellant.

Janes, Howard & Janes, for respondents.

PER CURIAM.

Appeal from a judgment in an action to determine boundary lines to land. The only question presented by the record is whether the court's findings of fact sustain its conclusions of law and judgment. We hold, upon a consideration of the record, that the conclusion of law and judgment are so clearly sustained by the facts found as to render any discussion of the question unnecessary.

Judgment affirmed.

GEORGE HARRISON and Others v. FRANK E. NIMOCKS.[1]

October 25, 1912.

Nos. 17,994—(269).

Order refusing to annul nomination of candidate — appeal.

It is not decided whether an order of the trial court dismissing proceedings to annul a nomination and declare another person duly nominated, after trial, is appealable. If this court has any jurisdiction at all over such proceedings, it is not that of a trial court. The order can only be reversed when the findings are manifestly and palpably against the weight of the evidence. [Reporter.]

Intent to deceive voters — evidence.

Assuming that an intent to deceive the voters into the belief that a certain publication was a sheet from a certain newspaper would make the publication a violation of Laws 1912, p. 23, c. 3, the finding that there was no such intent was sustained by the evidence. [Reporter.]

[1] Reported in 137 N. W. 972.

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Failure to file names of campaign committee.

The failure of a candidate for the legislature to file the names of his campaign committee is not a violation of law, where the evidence fails to show that the committee expended money. [Reporter.]

Violation of law by contestee.

The question here is whether contestee violated the law and not whether his opponent did. [Reporter.]

Proper party to proceeding.

It was proper to make the opponent of the contestee a party to the proceedings, but the inquiry into his conduct would only be material in case it were found that contestee was guilty, and then not to palliate that guilt, but to determine that the opponent was entitled to be declared the nominee. [Reporter.]

Illegal expenditure of money — findings sustained by evidence.

The contestee was charged with expenditures of money exceeding the limit placed by Laws 1912, c. 3. *Held*, the evidence did not require setting aside the findings of the trial court. [Reporter.]

The amended petition of George Harrison and 33 other contestants, qualified voters residing in the Fortieth legislative district, to the district court for Hennepin county, alleged that on August 26, 1912, Charles S. Cairns duly filed his affidavit and paid the legal fee as a candidate for nomination of the Republican party in class No. 2 at the ensuing primary election for representative from that district; that his name was placed upon the official ballot of the Republican party at the primary election and he received upwards of 1,100 votes at that election; that Frank E. Nimocks was also a candidate for that office in that class; that his name appeared upon the official ballot at the primary election as such candidate; that these two were the only persons who were voted for as such candidates for such nomination; that by the report of the county canvassing board it appeared that said contestee Nimocks received 31 more votes at said primary election than said Cairns and was nominated as such candidate; that unless the nomination were annulled by the court and it were determined contestee was not nominated, the name of said Nimocks would appear upon the official ballot at the ensuing general election; that said Nimocks was not in fact legally nominated, because he was guilty of deliberate, serious and material violation of chapter 3, p. 23, Laws 1912, and other provisions of law relating to nominations for office, to wit: That said Nimocks disbursed and obligations to make disbursements in his behalf were expressly and impliedly incurred in a sum of more than $400, and not less than $2,000, with his full knowledge and consent; that he and others incurred obligations with his knowledge and consent in a sum exceeding $500 for purposes forbidden by law in the employment of persons to work for and support his candidacy; that contestee appointed a personal campaign committee, naming them, which acted for contestee and disbursed large

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sums of money in his behalf received from other persons; that contestee did not file with the county auditor the names of his committee or their addresses; that the secretary of that committee filed a statement of certain disbursements made by the committee, but did not set forth any sum received by the committee or the date of the receipt of any sum, neither did the secretary set forth all of the disbursements incurred by it on behalf of contestee; that contestee and others published, issued and circulated certain specified literature and publications intended by contestee to influence the voters at the primary election to vote against said Cairns and to vote for said Nimocks, which publications failed to bear on the face thereof the name and address of the author of the same or the address of the contestee in whose behalf they were issued. The petition prayed, upon the grounds stated, that the right of said Nimocks to the Republican nomination be annulled and said Cairns pronounced duly nominated as the candidate at said election, and to that end prayed that contestee be ordered to appear and show cause why such relief should not be granted.

An order to show cause was issued, and in his answer the contestee alleged that his total expenses in connection with his candidacy for nomination were less than $400, and alleged that if any person or persons prior to September 17, 1912, disbursed or became liable to make disbursements in behalf of contestee, the same was done absolutely without his knowledge, consent, sanction or connivance; admitted the publication, issue and circulation of the statements and pamphlet and copy of the sheet set out in the petition, and alleged that the same were in all respects practically true. The answer charged that said Cairns was guilty of deliberate, serious and material violation of Laws 1912, c. 3, in that between the time of filing as candidate and the primary election he caused to be circulated a certain article which did not contain the name and address of its author, tending to influence the voters to vote against said Nimocks and for said Cairns, which was so worded as to give the impression that said Nimocks and one Fred A. Briggs had been guilty of a crime, for which said Briggs was convicted in the fall of the year 1911, whereas said Cairns knew or had the means of knowing said Nimocks was not in any way connected with the commission of the crime for which said Briggs was convicted; that said Cairns caused to be printed and circulated a report of a certain lunch club which report, in its statements concerning the contestee, was in all material respects false; that the name and address of said Cairns was not attached to the printed article; that said Cairns received from officers of certain corporations of the state sundry sums of money, enumerating ten persons, the corporation with which each was connected, and the amount contributed by each, and three other persons, and the corporation with which each was connected, who had promised to contribute money.

By order of the court of its own motion Charles S. Cairns was made a party, and in his reply denied each and every allegation of the contestee's answer.

The matter was heard before Dickinson and Booth, JJ., who announced their

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findings orally. They found, among other matters, that the individuals selected by the contestee to serve as a personal campaign committee never met as such, never organized or did anything in furtherance of his candidacy, never received or disbursed any funds or incurred any obligations to do so, and that the contestee abandoned the committee idea in the conduct of his campaign; that the contestee Nimocks did not personally expend nor authorize to be expended in his behalf an amount in excess of the amount allowed by law, and that any sum or sums in excess of $400 expended on his behalf was so expended without his authority, knowledge, consent, sanction or connivance, and that said Nimocks had not been guilty of any deliberate, serious or material violation of Laws 1912, c. 3, nor of any other provision of the law relating to nominations, and that any failure of the contestee to comply with the law in all respects was trivial, unimportant and limited in character, and did not arise from want of good faith, and that under the circumstances it would be unjust that he should forfeit or be deprived of his nomination, and the order to show cause was discharged and the proceedings dismissed.

The contestee having demanded that the court make a more specific finding in regard to improper conduct on the part of said Cairns, the court found that knowingly and in deliberate violation of section 7 of chapter 3, Laws 1912, said Cairns made, published and circulated in printed form certain false statements of material character in relation to the contestee, which statements tended to affect said voting at the primary election and were so intended by the contestant Cairns, enumerating eight instances which the court found were knowingly caused to be published and circulated by contestant for the purpose of affecting the voting. The court also found that a certain reprint of a newspaper article, of which contestant was joint author with another, was unqualifiedly misleading and violative of the spirit of the law. From the order dismissing the proceedings, contestants appealed. Affirmed.

Belden & Safford and *Charles S. Cairns*, for contestants.

Henry E. Barnes, for contestee.

PER CURIAM.

Appeal of contestants from an order of the district court of Hennepin county, dismissing the proceedings and declaring the contestee duly nominated as the Republican candidate for the office of representative from the Fortieth legislative district.

Charles S. Cairns and Frank E. Nimocks were rival candidates for the office at the primary election, where Nimocks received a majority of the votes, and was declared the nominee. The contestants, residents of the legislative district, petitioned the district court for its judgment annulling the nomination of Nimocks and pronouncing that Cairns had been nominated, alleging violations of the Corrupt Practices Act (Laws 1912, p. 23, c. 3). Contestee answered, and the case

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was heard upon oral evidence. The trial court made findings of fact in favor of the contestee as to each of the alleged violations.

Conceding, but not deciding, that the order is appealable, we have reached the conclusion that the findings of the trial court should not be disturbed. If this court has any jurisdiction at all over this proceeding, it is not that of a trial court. It is for us to reverse the order appealed from only when satisfied that the findings are manifestly and palpably against the weight of the evidence. Whether the publication of Exhibit C was intended to deceive the voters into the belief that it was a sheet from the Minneapolis Journal was a question of fact, and we think, assuming that such an intent to deceive would make the publication a violation of chapter 3, that the finding that there was no such intent is sustained by the evidence.

Neither can we hold that Nimocks' failure to file the names of his campaign committee was a violation of law, as the evidence does not show an expenditure of funds by such committee.

As to the charge that the contestee exceeded the limit in his expenditures, the evidence is not such as to warrant us in setting aside the finding that the publication of the advertisements in the News and Journal was without the authority, consent, or knowledge of contestee.

As indicated on the argument, we are of the opinion that the question here is solely whether contestee violated the law, and not whether his opponent did. We interpret the findings as deciding that contestee was innocent, not that he was guilty, and his offense excused because his adversary was also guilty. It was proper to make Cairns a party to the proceeding; but the inquiry into his conduct would only be material in case it were found that contestee was guilty, and then not to palliate that guilt, but to determine whether Cairns was entitle to be declared the nominee.

We hold that the findings are on all points sustained by the evidence, within the rule which governs us in reviewing a decision of the trial court on questions of fact.

Order affirmed.

SARAH C. MELIN v. H. A. STUART and Another.[1]

November 8, 1912.

Nos. 17,973—(207).

Dismissal of appeal.

Where notice of appeal was served August 10, and notice of trial in due time for the succeeding October term of this court, a motion to dismiss the appeal

[1] Reported in 138 N. W. 281.

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for failure to serve paper book and points and authorities, they not being served until October 15, was necessarily granted under the rules of court. [Reporter.]

Garnishment.

Where defendant had drawn his pay in advance from the garnishee before the garnishee summons was served, the court did not err in discharging the garnishee. It was immaterial that the garnishee city had no right to pay before the end of the month, or defendant to receive his pay. [Reporter.]

Appeal from an order of the municipal court of Minneapolis denying plaintiff's motion for judgment against the garnishee, Montgomery, J. Motion to dismiss the appeal granted, with ten dollars costs.

E. Luther Melin, for appellant.

A. M. Higgins, for respondent.

W. G. Compton, for garnishee.

PER CURIAM.

Motion to dismiss the appeal for failure to serve paper book and points and authorities in each of the three above entitled proceedings.

It appears that notice of appeal was served August 10, 1912, and notice of trial in due time for the October, 1912, general term of this court, but no paper book or points and authorities were served till October 15. Under the rules the motion must be granted. We do it with no great reluctance, for we are convinced that thereby plaintiff escapes additional costs. In one case the order is not appealable.

In discharging the garnishee in the other two cases, the court could not have erred; for defendant had drawn his pay in advance from the garnishee city for his service before the garnishee summons was served. It is immaterial that the city had no right to pay before the end of the month, or he to receive it. Clearly he could in no event again recover it from the city. Therefore the city did not owe him anything that plaintiff could reach.

The appeals are dismissed, with $10 costs to be taxed in one case only against plaintiff.

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STATE ex rel. VILLAGE OF DELANO v. GREAT NORTHERN RAILWAY COMPANY.[1]

November 22, 1912.

Nos. 17,865—(12).

Res judicata.

The former decision in this case (114 Minn. 293), the evidence on both trials being in point of substance the same, followed and applied as the law of the case.

After the former appeal, reported in 114 Minn. 293, 131 N. W. 330, the cause was remanded for a new trial. The case was tried before Giddings, J., who made findings and as conclusion of law ordered that a peremptory writ of mandamus issue directed to defendant Great Northern Railway Company, commanding it to construct at its own cost a safe, suitable, convenient and proper crossing through the embankment and under its tracks at the intersection thereof with Second street, with necessary approaches thereto, ample and sufficient for the safe, suitable, free and convenient passage and travel of the people of Delano and the traveling public; that it thereafter continuously maintain the same, and that the crossing and approaches be constructed and maintained at a width equal to that of the adjacent portions of Second street. From the judgment entered pursuant to the findings, defendant appealed. Reversed.

Cobb, Wheelwright & Dille, for appellant.

F. E. Latham and *Henry Spindler*, for respondent.

PER CURIAM.

This cause was before us on a former appeal (114 Minn. 293, 131 N. W. 330), where we held that the evidence then before the court was insufficient to justify a finding that the street in question became established as a public highway over and across defendant's right of way by dedication or user, and for certain errors appearing from the record the cause was remanded for a new trial. The question of dedication appears to have been the sole issue on the second trial. The trial court found the question in relator's favor, and ordered judgment for the relief demanded in the complaint. Judgment was entered accordingly and defendant appealed.

A careful examination of the evidence presented on this appeal, discloses no difference in point of substance from that presented on the former trial, and we sustain the contention of appellant that the former decision becomes the law

[1] Reported in 138 N. W. 671.

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of the case. Additional evidence was offered by both parties on the last trial, but it was merely cumulative of that on the first trial, and in no proper view changes the situation as respects the issue involved. The evidence taken as a whole presents a case substantially like Village of Benson v. St. Paul, M. & M. Ry. Co. 73 Minn. 481, 76 N. W. 261, where the court held as a matter of law that no dedication of a street over the railroad right of way was shown, and the findings of the court to the contrary were set aside. In their substantial facts the two cases cannot be distinguished. We therefore follow and apply the former decision in the case at bar as the law of the case.

If there be any urgent necessity for a crossing at this point, proceedings to extend the street would seem the most appropriate remedy. State v. St. Paul, M. & M. Ry. Co. 98 Minn. 380, 108 N. W. 261.

Judgment reversed.

KNUTE ANDERSON v. BROOKS-SCANLON LUMBER COMPANY.[1]

November 29, 1912.

Nos. 17,850—(79).

Complaint — demurrer.

The complaint states a cause of action for the negligent failure of defendant to provide plaintiff with a safe place in which to work, and it is not demurrable. [Reporter.]

Action in the district court for Hennepin county to recover $8,289.80 for personal injuries. From an order, Dickinson, J., overruling defendant's demurrer to the complaint, it appealed. Affirmed.

Price Wickersham, for appellant.

Healy, White & LaDu, for respondent.

PER CURIAM.

The complaint in this action, though flagrantly indefinite and uncertain and open to a motion to make its allegations more specific, and in default thereof that it be stricken out, is not demurrable. By permissible inferences the complaint states a cause of action, if in no other respects, for the negligent failure of defendant to provide plaintiff with a safe place in which to do his work.

[1] Reported in 138 N. W. 1033.

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ABRAHAM JUNTTI v. OLIVER IRON MINING COMPANY.[1]

December 6, 1912.

Nos. 17,966—(67).

Case followed.

Juntti v. Oliver Iron Mining Co. supra, page 518, followed, to the effect that the complaint states a cause of action. [Reporter.]

Action in the district court for St. Louis county to recover $1,000 for injuries sustained by plaintiff's minor son. The complaint, with other allegations, contained the same averments as the complaint in the other action. From an order, Dancer, J., overruling defendant's demurrer to the complaint, it appealed. Affirmed.

Paul H. Welch, for appellant.

William E. Culkin and *John E. Samuelson,* for respondent.

PER CURIAM.

Held, following Juntti v. Oliver Iron Mining Co. supra, page 518, 138 N. W. 673, that the complaint states a cause of action.

Order affirmed.

[1] Reported in 138 N. W. 674.

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INDEX

ADVERSE POSSESSION.

Evidence that defendant's deceased husband took possession of certain land owned by his father, occupied it, paid taxes on it, made permanent improvements on it, *held* evidence of possession with the consent of the owner, not of adverse possession.

—Hayes v. Hayes, 1, 4.

To make out adverse possession, so as to bar an action for its recovery, the possession of several successive holders may be tacked together, but privity between them is essential. Such privity exists between two successive holders when the later takes under the earlier by descent, will or grant, or by a voluntary possession.

—Marek v. Holey, 219.

ALTERATION OF INSTRUMENT.

Action upon promissory notes, on one of which three red ink lines were drawn through defendant Johnson's signature as joint maker on the face of the note, and his name was signed to the guaranty upon the back. Defense of other joint maker that the note was fraudulently altered after its delivery. *Held:* The evidence sustained the findings to the effect that there was no alteration of the note after delivery to payee, so as to release the makers or guarantors.

—First National Bank of Rush City v. Rush City Starch Co. 51, 53.

In an action to recover upon a promissory note, the evidence is *held* to support the verdict upon the issue whether, subsequent to the delivery of the note, a material alteration thereof was made without the knowledge or consent of the maker.

—Bakke v. Melby, 504.

Action on a promissory note made in 1905. The sole issue was whether the date had been altered subsequent to its delivery. Defendant testified he knew nothing of the change until about August, 1910. *Held:* The admission of a conversation in 1908 between the opposing attorneys to show defendant was mistaken, was error, but harmless.

—Bakke v. Melby, 507.

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APPEAL AND ERROR.

WHEN APPEAL CAN BE TAKEN.

In proceedings to register title to land under the Torrens law [R. L. 1905, c. 65], no appeal lies from a denial of a defendant's demand for a jury trial or from an order denying defendant's motion to dismiss the application.

—Peters v. City of Duluth, 96.

In proceedings to assess the cost of land taken for park purposes under Sp. Laws 1889, p. 567, c. 30, § 4, an order of the district court denying a motion of objectors to vacate a prior order confirming the assessment and grant a new trial is construed as an order denying a new trial and *held* to be appealable.

—Everington v. Board of Park Commissioners, 335.

The approved and correct procedure to bring before the court for review the decision of the district court in mandamus cases is to appeal from the judgment or an order denying a motion for a new trial. State v. McKellar, 92 Minn. 242, 99 N. W. 807. But this course is not exclusive of any other.

—State ex rel. v. Cook, 409, 410.

An order, made upon the merits, denying an application for a reduction of alimony previously awarded, on the ground of the changed financial condition of the parties, *held* appealable.

—Haskell v. Haskell, 484.

It is not decided whether an order of the trial court dismissing proceedings to annul a nomination and declare another person duly nominated, after trial, is appealable. If this court has any jurisdiction at all over such proceedings, it is not that of a trial court. The order can only be reversed when the findings are manifestly and palpably against the weight of the evidence.

—Harrison v. Nimocks, 535.

BOND ON APPEAL.

The weight of authority supports the proposition that where an appeal bond is not in the express terms of the statute, it may be valid as a common-law obligation voluntarily entered upon by the parties.

—First State Bank of Mountain Lake v. C. E. Stevens Land Co. 214.

A stipulation for an affirmance of an order or judgment appealed from, made in good faith, does not release the surety on the appeal bond.

—First State Bank of Mountain Lake v. C. E. Stevens Land Co. 209.

In an action, findings were made directing judgment to be entered in favor of the plaintiff therein, the stay allowed had expired, and plaintiff

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APPEAL AND ERROR—Continued.

threatened to enter judgment, whereupon the defendant promised that, if plaintiff would refrain from entering judgment in the intended appeal, defendant would give a satisfactory bond to pay all judgments and costs that might be entered in the action. If it be proven that such an agreement was made and kept by plaintiff, and pursuant thereto an appeal bond was executed, the bond is a valid common-law obligation and binding in all its terms.

—First State Bank of Mountain Lake v. C. E. Stevens Land Co. 209.

The surety on an appeal bond has no voice in the conduct of the litigation or any interest in the matters involved. The principal alone has the right to carry on or terminate the appeal in the manner he chooses, if not prevented by his adversary or the court. Therefore, if at any time he concludes that continuing the litigation will be of no advantage to him, or will entail useless expense, he should have the right to stipulate for an affirmance or a dismissal of the appeal without thereby releasing the surety on the bond.

—First State Bank of Mountain Lake v. C. E. Stevens Land Co. 212.

RETURN ON APPEAL.

Where a written stipulation of the facts is made a part of the findings of fact of the trial court, it is unnecessary that the stipulation be allowed and certified as the settled case.

—Sleepy Eye Milling Co. v. Chicago & Northwestern Railway Co. 200.

In order to determine the prejudicial effect of errors properly assigned, the whole record may be examined, and if, in the light thereof, the findings appear indefinite and uncertain on a vital issue, the judgment should not be allowed to stand.

—First State Bank of Mountain Lake v. C. E. Stevens Land Co. 209.

Where there was no settled case containing all the evidence, but a bill of exceptions which contained, as certified by the trial judge, all the evidence and proceedings necessary to explain the alleged error, the bill of exceptions was sufficient to present the question whether the admission of certain evidence quoted in the record was prejudicial.

—Town of Wells v. Sullivan, 390, 391.

ASSIGNMENTS OF ERROR.

Where a motion for a new trial is made on more than one ground, an assignment of error that the trial court erred "in refusing to grant defendant a new trial" is too general to present any question for consideration.

—McLaughlin v. Cloquet Tie & Post Co. 456.

In an action for personal injury, defendant excepted to an instruction

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APPEAL AND ERROR—Continued.

to the jury that, if they found for the plaintiff, they might take into consideration plaintiff's loss of time resulting directly from his injury, on the sole ground that loss of time was not pleaded. On plaintiff's motion, the trial court allowed an amendment of the complaint in this respect. On the motion for a new trial and in this court, defendant assigned the same reason stated in taking the exception at the trial. *Held:* That defendant was limited to the ground relied on and urged in the exception and assignment of error in the trial court and could not urge the further reason that there was no evidence of the value of the time lost.

—Stuhr v. Wright County Telephone Co. 511, 512.

REVIEW.

An objection that a question asked a witness assumes a fact not proven cannot be urged on appeal, unless made at the trial.

—Trustees of Little Cedar Congregation v. Chicago, Milwaukee & St. Paul Railway Co. 181.

Where the question of misjoinder of causes of action was not raised by demurrer or answer, it cannot be raised in this court on appeal.

—Sleepy Eye Milling Co. v. Chicago & Northwestern Railway Co. 200.

Conceding, but not deciding, that there can be no recovery in a personal injury case for mental anguish or humiliation arising solely from a deformity or disfigurement that is not discoverable except when the person is exposed, it is *held* that this question is not raised by an exception, after the jury retires, to an instruction that the "permanent deformity" suffered by plaintiff was proper to be considered.

—Johnson v. Forrestal, 202.

Action by a trespasser for being thrown from a moving train. Defendant cannot complain of the court's omission to instruct on the issue whether the issue of assault and self-defense raised by the answer, where there was no request for an instruction submitting the question of self-defense, there was no exception to the charge at the trial, and the attention of the court was not called to the insufficiency of the charge.

—Gee v. Great Northern Railway Co. 440.

Objections on appeal are unavailing, where an issue not made by the pleadings was litigated by consent and submitted to the jury, was covered by one of defendant's requests and defendant was not misled.

—Johnson v. Scott, 473.

Under the rule of Steinbauer v. Stone, 85 Minn. 274, 88 N. W. 754, an objection in this court to a portion of a charge to the jury will not be considered where no exception was taken thereto at the trial.

—Johnson v. Scott, 473.

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APPEAL AND ERROR—Continued.

To justify this court in reversing an order denying a new trial, and in ordering a new trial upon the ground that one of the jurors was not sworn as required by law, the fact that the juror was not sworn should affirmatively and clearly appear. Where on the showing made the question is left in doubt, the decision of the trial court will be treated as final.

—Bakke v. Melby, 504.

HARMLESS ERROR.

It was not prejudicial to either party to instruct the jury as follows: When you have returned your answers (to particular questions), the court will go all over the evidence and determine whether the deed should be set aside. In the final analysis it will be a question for the court to decide, but the court will be governed by the answers the jury makes to those particular questions in determining whether the facts relating to those questions are true or not.

—McEleney v. Donovan, 298.

Action for personal injury. The court charged the jury that it was the duty of defendant to have the boiler inspected, as required by law, before using it. Verdict for defendant. *Held:* The admission of evidence that the person from whom it was bought told defendant's superintendent that it had been subjected to test, was not reversible error.

—Sivertson v. City of Moorhead, 468, 469.

EVIDENCE.

This court is not required to discuss the evidence for the purpose of demonstrating the correctness of the trial court's action.

—Weiss v. Great Northern Railway Co. 358.

Rulings on the introduction of evidence assigned as error were not discussed because not argued in appellant's brief or oral argument.

—Schmeisser v. Albinson, 428, 433.

This court, on appeal, cannot disturb the findings of the trial court, if the evidence fairly tends to support them.

—Beneke v. Estate of S. M. Beneke, 447.

Where there was error in the reception of evidence, and it cannot be ascertained from the record whether the court predicated its decision upon the evidence so erroneously received or upon that properly received, there must be a reversal.

—State v. Hager, 517.

A finding of the trial court that attorneys were to receive a reasonable

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APPEAL AND ERROR—Continued.

compensation, and such value was $250, will not be disturbed upon appeal, because there may be some conflict in the testimony.
—Scannell v. Hendrickson, 529.

Discretion of Trial Court.

The amendment of pleadings is a matter resting in the discretion of the trial court, and its action will not be reversed except for a clear abuse thereof. Rule applied where the trial court denied defendant's application on the trial to amend his answer in an action for divorce by the substitution of new issues.
—Longbotham v. Longbotham, 141, 142.

Dismissal of Appeal.

Where notice of appeal was served August 10, and notice of trial in due time for the succeeding October term of this court, a motion to dismiss the appeal for failure to serve paper books and points and authorities, they not being served until October 15, was necessarily granted under the rules of court.
—Melin v. Stuart, 539.

ATTORNEY AND CLIENT.

Public policy does not permit a litigant to surrender control of his lawsuit so that he shall retain no voice or interest in the litigation. Rule applied to the provisions of a policy of automobile insurance.
—Patterson v. Adan, 312, 313.

Attorney suspended from practice in the courts of the state for one year, because of wilful misconduct in inserting grossly libelous charges in complaints in three actions for slander against the defendants therein.
—State Board of Law Examiners v. Bensel, 532.

AUDITOR.

See County and County Officers.

BANK AND BANKING.

The answer of a bank to a suit brought by the payee of a check drawn on ample funds on deposit averred that, before the check was presented for payment, the drawer notified the bank that the check was without consideration and was obtained by fraud, and directed the bank not to pay the same, and that during all the time that the drawer had had funds on deposit, and long prior thereto, the custom and usage prevailed, among banks and their depositors in the city and state where

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BANK AND BANKING—Continued.

were all the parties, that before a check is presented for payment the drawer has the right to revoke the authority of the bank to pay. *Held* not demurrable.

—Taylor v. First National Bank of Minneapolis, 525.

The practice and usage pleaded become part of the legal contract or obligation between the depositor and the bank under which the funds deposited are to be paid out, so that the checks drawn against the deposit necessarily become subject thereto, at least so long as such checks remain in the hands of payees.

—Taylor v. First National Bank of Minneapolis, 529.

BANKRUPTCY.

PREFERENCE AND TRANSFER BY BANKRUPT.

The word "transfer" is used in the bankruptcy act of 1898 in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another.

—Galbraith v. Whitaker, 453.

Under the pleadings and the admitted facts plaintiff was entitled to some relief, even if he failed to establish that the contract between the defendants was a fraudulent transfer as to the then existing creditors of one of the parties to the contract.

—Kanne v. Kanne, 265.

Under section 60, subdivisions a and b of the bankruptcy act as amended [36 St. 842, § 11], where an insolvent debtor procures or suffers a judgment to be entered against himself within four months before the filing of the petition in bankruptcy, and the judgment then operates as a preference, the preference is not voidable by the trustee, unless it appears that the creditor, at the time the judgment was entered, had reasonable cause to believe that the enforcement of the judgment would effect a preference.

—Galbraith v. Whitaker, 447.

Where, under the same sections, an insolvent debtor makes a transfer of any of his property, and the effect is a preference of any creditor, such preference is voidable by the trustee and the amount thereof may be recovered, if it appears that the creditor receiving the preference had, at the time of the transfer, reasonable cause to believe that such transfer would effect a preference.

—Galbraith v. Whitaker, 447.

The word "then" in the phrase "and the judgment or transfer then operate

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BANKRUPTCY—Continued.

as a preference," etc., which occurs in subdivision b of that section, apparently refers to the time the judgment was entered.

—Galbraith v. Whitaker, 451.

In determining whether the creditor had reasonable cause to believe a transfer by the debtor would effect a preference, facts which are sufficient to put an ordinarily prudent man upon inquiry as to his debtor's solvency charge such person with all the knowledge he could have acquired by the exercise of reasonable diligence.

—Galbraith v. Whitaker, 447.

The evidence did not conclusively show that defendants, at the time of a transfer by their insolvent debtor of his property, had reasonable cause to believe that such transfer would effect a preference.

—Galbraith v. Whitaker, 447.

EXECUTION SALE EQUIVALENT TO A TRANSFER OF DEBTOR'S PROPERTY.

Where a creditor procures a judgment against an insolvent debtor, and thereafter procures execution thereon to be issued and levied on personal property of the debtor, and at the execution sale such property is sold and the proceeds of the sale paid to the creditor in satisfaction of the debt, it is *held* that such execution sale and payment of the proceeds thereof constitute a transfer of his property by the debtor, within the meaning of those words as used in the act.

—Galbraith v. Whitaker, 447.

BILLS AND NOTES.

The execution of a promissory note gives rise to a rebuttable presumption that the payee was not at the time of such transaction indebted to the maker.

—Beneke v. Estate of S. M. Beneke, 446.

The legal obligation of an indorsing payee on a promissory note is that of indorser only, and cannot be considered, or proven to be, that of a maker.

—Burwell v. Gaylord, 426.

A complaint on a promissory note against an indorser, which fails to allege notice of dishonor, is demurrable.

—Burwell v. Gaylord, 426.

AGREEMENT TO HONOR DRAFT.

One Hukill, residing in Pittsburgh, Penn., sent a telegram to the defendant, a resident of this state, reading: "Will you wire me that you will honor draft for $300?" Defendant telegraphed back, "I will." Thereupon Hukill presented draft for $300, drawn on defendant to

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BILLS AND NOTES—Continued.

Hukill's order, and the two telegrams, to plaintiff, which purchased the draft on the strength of the telegrams. *Held*, that the telegrams created an agreement on the part of defendant to honor the draft.

—Oil Well Supply Co. v. MacMurphey, 500.

As against plaintiff, the purchaser of the draft, defendant could not show that Hukill had failed to comply with the condition upon which defendant had consented to telegraph his agreement to honor Hukill's draft; there being no proof, or offer to prove, that plaintiff knew of the arrangement between Hukill and defendant.

—Oil Well Supply Co. v. MacMurphey, 500.

BOUNDARY.

Action to recover possession of land to which plaintiff claimed title by reason of a practical location of the boundary line, acquiesced in by the parties. Verdict in favor of defendant. *Held:* The trial court did not err in denying plaintiff's motion for judgment notwithstanding the verdict and in granting his motion for a new trial.

—Marek v. Holey, 218.

DESCRIPTION.

The rule in Wait v. May, 48 Minn. 453, 51 N. W. 471, that the grant of a lot in the original plat of the village of Excelsior bounded on Lake street is presumptive evidence of an intention to convey title to the full width of Lake street, and to the shore of the lake, has no application to conveyance by deed or devise after Lake street has been vacated.

—Empenger v. Fairley, 186.

After such vacation, the owner of a lot in such original plat conveyed by metes and bounds that part of the lot south of Lake street, and by a separate deed conveyed to the same grantee that part of the lot north of Lake street and between such street and the lake shore. *Held*, that the first-named deed did not convey title beyond the center line of that portion of Lake street not vacated, and that a devise by the grantee referring to said deed for a description of the real estate devised, gave title to the devisee only to said center line.

—Empenger v. Fairley, 186.

If a deed bounds the land upon a street or highway, title passes to the center thereof, subject to the public easement, if there be nothing in the deed, or the location of the land, or the relation of the parties showing a different intention. But where a deed expressly makes the nearer external line of the highway or street the boundary line of the tract

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BOUNDARY—Continued.

conveyed, and no other language is used indicating a contrary intention, no title to the street passes to the grantee.

—Pratt v. Quirk, 319.

A deed conveyed that part of a lot lying south of county road. Another deed conveyed by metes and bounds, one call being south to the northerly line of the Wayzata county road * * * thence along said county road. The road was subsequently vacated. *Held:* The former deed conveyed the fee to the southerly half of the highway, subject to the public easement. The second deed likewise conveyed the fee to the center of the highway upon which the tract abutted, subject to the public easement.

—Pratt v. Quirk, 316, 319.

The decision was supported by the findings of fact.

—Dahlberg v. Johnson, 534.

BROKER.

Action to recover the price of a carload of potatoes. Counterclaim that plaintiffs were indebted to defendant for advances on other cars made by him as produce broker. Verdict in favor of defendant for $250. *Held:* There was ample evidence to support the verdict, and there were no reversible errors.

—Justice v. Parshall, 533.

CANCELATION OF INSTRUMENT.

A deed, duly witnessed and acknowledged by a grantor, is proof that whatever title he had and purported to convey vested in the grantee, without any further testimony as to his mental condition, and the burden is undoubtedly on the one who seeks to have the deed annulled to prove the facts on which the action is predicated.

—McEleney v. Donovan, 299.

In actions to set aside and annul a written instrument on the ground that it was procured by fraud the evidence must be clear and strong.

—Schmeisser v. Albinson, 432.

CARRIER.

TRANSPORTATION OF GOODS.

The bill of lading, under and pursuant to which certain apples were shipped over defendant's road, provided for a notice of any claim for injury or damage to the property to be served upon the company within four

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CARRIER—Continued.

months. No such notice was served, and the trial court found as a fact that defendant waived the same. It was *held* that the evidence does not sustain the finding.

—Gamble-Robinson Commission Co. v. Northern Pacific Railway Co. 40.

A waiver of such a notice cannot be predicated upon a mere denial of liability when the claim is presented.

—Gamble-Robinson Commission Co. v. Northern Pacific Railway Co. 40.

In determining what acts on the part of a person entitled to notice of claim, under a contract stipulation, will constitute a waiver, a distinction is to be observed between those cases where the alleged waiver occurred before the expiration of the time fixed by the contract for the service of the notice and those cases where the acts and conduct relied upon occurred after that date.

—Gamble-Robinson Commission Co. v. Northern Pacific Railway Co. 42.

Acts and conduct occurring at a time when the notice could properly be served, having a tendency to lead to the belief that formal notice will not be insisted upon, or which are inconsistent with an intention to rely upon a compliance with the contract in that respect, constitute a waiver which, on the theory of equitable estoppel, the party will not be allowed to repudiate. But where, as in the case at bar, the conduct relied upon as a waiver occurs after the expiration of the time limited for the notice, the situation is entirely different. The failure to give the required notice vests in the party entitled to it a complete defense to an action upon the asserted claim.

—Gamble-Robinson Commission Co. v. Northern Pacific Railway Co. 42.

A contract by a common carrier to supply to a particular interstate shipper a specified number of cars on certain dates, to be used in such shipment, is not a violation of the act of Congress regulating interstate commerce (24 St. 380), unless it appear that the contract, if performed, will in fact extend to that shipper an undue or unreasonable preference over other shippers.

—W. H. Ferrell & Co. v. Great Northern Railway Co. 302.

Evidence *held* sufficient to support the verdict; and, though perhaps indefinite in some respects, defendant is not, under the rule of Cruikshank v. St. Paul F. & M. Ins. Co. 75 Minn. 266, 77 N. W. 958, entitled to judgment notwithstanding the verdict.

—W. H. Ferrell & Co. v. Great Northern Railway Co. 302.

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CARRIER—Continued.

The trial court did not err in submitting to the jury whether the contract in fact conferred any undue or unreasonable advantage upon plaintiff.

—W. H. Ferrell & Co. v. Great Northern Railway Co. 307.

Action by a consignee against a carrier for damages for unreasonably delaying the transportation of a carload of coal, and for a conversion of the coal. *Held*, upon the facts stated in the opinion, that a settlement with the consignor is not a defense to the action.

—Sleepy Eye Milling Co. v. Chicago & Northwestern Railway Co. 199.

Even if it be conceded that by the laws of Illinois the consignor might have maintained an action against the carrier for the benefit of plaintiff, it does not follow that defendant carrier had a right to settle with the consignor and discharge the cause of action of the plaintiff, after defendant had been notified that the property consigned had been paid for, that it then belonged to plaintiff and that plaintiff's claim for damages had been presented.

—Sleepy Eye Milling Co. v. Chicago & Northwestern Railway Co. 202.

SHIPPING FACILITIES—SWITCHING CHARGES.

Action to recover for the amount paid defendant for switching cars to plaintiff's elevator on the alleged ground that the exaction thereof was a discrimination. Upon the facts found the trial court ordered judgment for one dollar. *Held:*

1. A carrier is bound to treat all shippers with equality and without discrimination. It is also bound, unless there be custom or contract to the contrary, when it receives shipments in carload lots, to make delivery at the consignee's place of business when located on its industrial tracks, or to connecting carriers and switching roads when the consignee's business is located thereon. It is not, however, bound, at its own charge, to make such delivery beyond its own or leased tracks.
2. The facts found show that plaintiff's elevator was not situated on defendant's tracks and the charges were collected in accordance with its published tariff, and were paid by defendant to another company upon whose track the elevator was situated.
3. Findings of fact considered, and *held* that they sustain the conclusion of law that there was no discrimination and the plaintiff was entitled to judgment for one dollar only for charges improperly collected upon one car.

—Banner Grain Co. v. Great Northern Railway Co. 68.

TRANSPORTATION OF PASSENGERS.

A passenger, alighting at a railway station very early in the morning,

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CARRIER—Continued.

groped her way in the dark along the wall to find the door of a toilet room and, entering a partly opened door, fell to the basement and was injured. *Held:* That it does not conclusively appear that plaintiff was guilty of contributory negligence. The question was one for the jury.
—Mathews v. Great Northern Railway Co. 49.

Action for ejecting passenger from a street car for failure to pay his fare. Evidence that conductor accepted and gave change for a Canadian quarter and subsequently demanded return of the change because the quarter was not good. Plaintiff returned the change and, having no other money, was ordered to leave the car. There was no evidence defendant had given its conductor directions to refuse such coins. The court found the coin tendered was a Canadian coin and ordered judgment in favor of plaintiff. *Held:*

1. While the question whether Canadian coins pass as current money in this state is not involved, it is a matter of almost everyday experience to receive and pay such coins in St. Paul and other parts of the state.
2. Evidence that the identical quarter was received by plaintiff from defendant the preceding day as part of the change given him at that time was admissible.
3. The findings are supported by the evidence.
—Konkle v. St. Paul City Railway Co. 177.

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Aldrich v. Wetmore, 56 Minn. 20, 57 N. W. 221.
—Worden v. Bielenberg, 333.

Anderson v. Fred Johnson Co. 116 Minn. 56, 133 N. W. 85.
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Avery Planter Co. v. Peck, 86 Minn. 40, 89 N. W. 1123.
—Detwiler v. Downes, 48.

Banks v. Pennsylvania R. Co. 111 Minn. 48, 126 N. W. 410.
—Gamble-Robinson Commission Co. v. Northern Pacific Railway Co. 43.

Breault v. Archambeau, 64 Minn. 420, 67 N. W. 348.
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—Berghuis v. Schultz, 92, 93.

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—O'Brien v. Northwestern Consolidated Milling Co. 10.

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Larson v. Minneapolis Threshing Machine Co. 92 Minn. 62, 99 N. W. 623.
—Detwiler v. Downes, 48.

Martin v. Wakefield, 42 Minn. 176, 43 N. W. 966.
—McKinnon v. Red River Lumber Co. 482, 483.

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—Brantman v. City of Canby, 398.

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—Gaughan v. City of St. Paul, 65, 67.

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—McLaughlin v. Cloquet Tie & Post Co. 457, 458.

Ohage v. Union Ins. Co. 82 Minn. 426, 85 N. W. 212.
—Oppenheim v. Fireman's Fund Insurance Co. 424.

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—O'Donnell v. Daily News Co. 387.

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—Evans v. Drake & Stratton Co. 59.

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—Worden v. Bielenberg, 333.
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—Haskell v. Haskell, 489.

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—Weiss v. Great Northern Railway Co. 360.

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—Orr v. Sutton, 193, 198.

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—McLoone v. Brusch, 288.

Wemple v. Knopf, 15 Minn. 355 (440).
—McLoone v. Brusch, 288.

CHATTEL MORTGAGE.

A chattel mortgage running to a copartnership was witnessed by one of the copartners, but the fact that the witness was a copartner did not appear upon the face of the mortgage. As so executed it was filed in the proper office. *Held*, following Bank of Benson v. Hove, 45 Minn. 40, 47 N. W. 449, that since the defect in the execution of the instrument

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CHATTEL MORTGAGE—Continued.

did not appear upon its face, the record thereof was constructive notice to persons dealing with the mortgaged property.

—Berkner v. D'Evelyn, 246.

The sale of mortgaged personal property at public auction under an arrangement between the mortgagor and mortgagee, though not as a foreclosure of the mortgage in accordance with the statutes, but in good faith for the purpose of raising funds to discharge the mortgage debt, and without purpose to defraud subsequent mortgagees, does not constitute a waiver of the rights of the mortgagee as against a second mortgagee of the same property.

—Berkner v. D'Evelyn, 246.

The first mortgagee, or purchasers of the property at such sale, may interpose the first mortgage in defense to an action by the second mortgagee, in which a wrongful sale of the property is charged.

—Berkner v. D'Evelyn, 246.

There can be no difference of a substantial nature between a mortgage improperly acknowledged by a notary who was an officer and stockholder of the mortgagee corporation and one witnessed by an interested party, where the fact of interest and consequent disqualification does not appear on the face of the mortgage. If there is any difference from a legal standpoint it would seem that the improper witnessing was of less significance than the unauthorized acknowledgment.

—Berkner v. D'Evelyn, 250.

A provision of a mortgage executed to secure the purchase price of threshing machinery, that the gross earnings of the machinery should be paid to the mortgagee, free from operation liens, but that forty per cent of the earnings so received by the mortgagee should by it be paid to the mortgagor for operation expenses, construed and *held* to give the mortgagor an immediate and absolute right to forty per cent of the proceeds, less expense of collection of certain threshing accounts assigned by him, pursuant to the terms of the mortgage, to the mortgagor and by it collected.

—Meier v. Northwest Thresher Co. 289.

Transaction in which the said claims were assigned to the mortgagee, considered and *held* to import a direction from the mortgagor to the mortgagee to pay certain debts due, at the time of such assignment, from the mortgagor to the plaintiff and his assignors for labor performed in connection with the operation of the said machinery, so that the plaintiff had the right to recover from the mortgagee that proportion of the proceeds of the assigned accounts which, by the terms of the mortgage, belonged to the mortgagor for operating expenses.

—Meier v. Northwest Thresher Co. 289.

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CONSTITUTION.

Const. Art. 1, § 8, providing that every person is entitled to a certain remedy in the law for all injuries or wrongs received by him, has been held not to create any new right, but to be merely a declaration of a general fundamental principle.

—Peters v. City of Duluth, 105, 106.

DELEGATION OF LEGISLATIVE POWER.

This appeal involves the validity of the provisions of the primary election statute of 1912 [Laws 1912, p. 4, c. 2] for classifying candidates on the primary ballot, when two or more persons are to be elected for the same office. *Held:* Whatever the people have not, by the Constitution, incapacitated themselves from doing, they may do by their representatives in the legislature, unless it be an act forbidden by the Federal Constitution, and the provisions of the statute are valid unless they are so clearly repugnant to the Constitution as to leave no fair doubt as to their invalidity.

—State ex rel. v. Erickson, 152.

GRANTING TO ADMINISTRATIVE OFFICERS JUDICIAL POWERS.

R. L. 1905, § 5455, amended by Laws 1911, p. 80, c. 61, authorizing the board of control to transfer prisoners from the reformatory to the state prison, and vice versa, is not unconstitutional, as constituting a legislative attempt to vest administrative officers with judicial functions.

—State ex rel. v. Wolfer, 368, 377.

DUE PROCESS OF LAW.

In proceedings to assess the cost of lands acquired for park purposes in Minneapolis, it is *held:*

1. The owners of land to be assessed were at some stage of the proceedings entitled to a hearing de novo upon all objections they might have, in order to constitute due process of law.
2. The trial in the district court on the application to confirm the assessment of the park assessors is not such a hearing. The court was really acting as a court of appeal, the report of the assessors having much the effect of the verdict of a jury or the decision of a trial court.
3. The order or judgment confirming such assessment is a final order or judgment, and precludes the objectors from having such a hearing thereafter.
4. The hearing provided by the law to be held before the park assessors is such a hearing. Notice of the time and place thereof, served duly by publication which describes no property except that taken for park purposes, is not directed to anyone by name and does not describe the property to be assessed therefor, or the boundaries of the assessment district, is a sufficient notice to constitute due process of law.

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CONSTITUTION—Continued.

5. There is no fixed rule as to what kind of a notice is necessary in order to make due process of law. The assessment for a local improvement is a public matter, a species of tax, and the due process clause of the Constitution is satisfied easier in such cases. It is not correct to say there must be the same degree of certainty in a description as is required in a deed.

—Everington v. Board of Park Commissioners, 334, 339.

UNIFORMITY OF TAX UPON SAME CLASS.

Laws 1907, p. 449, c. 328, is not unconstitutional because it does not impose the tax uniformly upon all members of the class of mortgages included within its provisions, or assess the tax in accord with the actual value of the security.

—Orr v. Sutton, 198.

CONTRACT.

OFFER AND ACCEPTANCE.

In contracts made by telegrams, the fewest possible words are used, and often omitted words in a message are to be supplied from the sense or context of the message to which it is an answer. This is so usual an occurrence in the business world that courts must take notice of the fact.

—Oil Well Supply Co. v. MacMurphey, 503.

A telegraphic offer of employment, which is manifestly the result of prior verbal negotiations, and which alone does not purport to contain all the essential terms of a contractual offer, must be considered as though the language thereof had been used at the conclusion of the negotiations, or, conversely, as though express reference to the substance of the negotiations had been incorporated in the telegram; and the terms of the contract created by a telegraphic acceptance of such offer are to be gathered from the telegrams and the negotiations taken together, and not from the telegrams alone. Telegrams construed to constitute a contract for one year at the stipulated salary per week.

—O'Donnell v. Daily News Co. 378, 385.

Where defendant, after personal negotiations, sent to plaintiff in Pennsylvania a telegram offering employment at a specified sum, adding "When can you report?" plaintiff wired in answer "Will be there next Monday," and defendant confirmed its telegram by letter, the court *held* that February 7, the next Monday after the message, was the date the parties intended the employment should begin.

—O'Donnell v. Daily News Co. 378, 385.

We think that it would astonish a business man to learn that, under

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CONTRACT—Continued.

the law, if he hires an agent or servant at a weekly, monthly, or yearly salary, with the understanding that the employee is to report at some future date, he must, in the absence of an express agreement to such effect, pay the employee, not from the time when the subsequent performance of the service begins, but from the date on which the agreement for the future service is made.

—O'Donnell v. Daily News Co. 388.

IN RESTRAINT OF TRADE.

Covenant of a contract for the sale of a mercantile business *held* not invalid as in restraint of trade, or as tending to create a monopoly.

—Berghuis v. Schultz, 87.

Where plaintiff sold his mercantile business in a village of about fifty inhabitants (which contained two mercantile stores), and by the sale the number of such stores was not diminished, and guaranteed the buyer that the building occupied by plaintiff's store should not be rented or let for the purpose of carrying on the business of general merchandise for a year during the continuance of plaintiff's lease, the court *held*, as a question of law, that the contract was not void, either as creating a monopoly or as being in restraint of trade, though the covenant in question was concededly made for the purpose of preventing the establishment of another store in the village.

—Berghuis v. Schultz, 91.

CONSTRUCTION.

In construing written contracts, the meaning of the language employed, taken in its ordinary and popular sense with reference to the matter in hand, controls unless, when so viewed, an ambiguity still remains. If there be uncertainty after thus examining the agreement, the situation of the parties and the circumstances surrounding the transaction may be considered, in order in arrive at the true and intended meaning of the ambiguous expressions used.

—Oil Well Supply Co. v. MacMurphy, 503.

A contract should be construed according to the intention of the parties as gathered therefrom, without reference to the consequences, statutory or otherwise; and if a contract, doubtful as to date of the commencement of its performance, is held not to be within the statute of frauds, it should be so held solely because the statute covers only such contracts as affirmatively show by their terms that they are not to be or cannot be performed within a year, and not because the court deems obnoxious a law which the legislature has seen fit to place in the statutes and has allowed to remain therein for many years.

—O'Donnell v. Daily News Co. 387.

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CONTRACT—Continued.

PERFORMANCE OR BREACH.

In the erection of a flat building plaintiff agreed to do all the carpenter work for $1,400, the owner to furnish the material. The court found a substantial performance of the contract, although there were omissions in the work which would require $37.25 to complete. *Held*, that considering the contract price and the character and detail of the work performed, the finding that defects and omissions amounted to $37.25 is not contradictory of the finding of substantial performance, which finding is amply sustained by the evidence.

—Lindquist v. Young, 219.

CORPORATION.

It is elementary that corporations, whether public or private, can exercise no power or authority except such as is expressly conferred upon them by law or by their articles of association, and such as are incidental to the exercise of the powers expressly granted. When a corporation exceeds these limits, its acts are wholly ultra vires, and subjects its charter to forfeiture at the suit of the state.

—International Lumber Co. v. American Suburbs Co. 77, 86.

It is beyond the authority of a local municipal board or council to enlarge such powers by attempting to confer upon the corporation powers not possessed by its charter or articles of incorporation.

—International Lumber Co. v. American Suburbs Co. 77.

The authority of the Suburbs Company cannot be enlarged by intendment, and the general clause of its articles of association, authorizing the transaction of any lawful business, must be limited to such matters and transactions as have some relation to the general business of the company. The powers of the company could not be enlarged by the local authorities.

—International Lumber Co. v. American Suburbs Co. 86.

COUNTY AND COUNTY OFFICERS.

BOND OF AUDITOR.

In an action upon the official bond of a county auditor, wherein both the auditor and his sureties are made defendants, the terms of the bond define and determine the extent of the auditor's liability, which is no greater and no less than that of his sureties; the liability of both being measured by the terms of the bond, reasonably, but strictly construed.

—Foster v. Malberg, 168.

In an action upon such bond for failure to give the statutory notice of a tax sale required by R. L. 1905, § 927, the liability of the auditor is neither

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COUNTY AND COUNTY OFFICERS—Continued.

enlarged nor diminished by R. L. 1905, § 4533, providing that an official bond shall be security to all persons severally for the official delinquencies against which it is intended to provide, and that any person injured thereby, or who is by law entitled to the benefit thereof, may sue thereon in his own name.

—Foster v. Malberg, 168.

COURT.

An order sustaining a demurrer to a complaint is of no effect as determining the law of the case after the service of an amended complaint.

—First State Bank of Mountain Lake v. C. E. Stevens Land Co. 209.

CREDITOR'S BILL.

A complaint in the nature of a creditor's bill, from which it appears that another action has been begun and is still pending to determine the liability of a resident defendant on the facts stated in the bill, such action not having proceeded to judgment or verdict, though a writ of attachment has been issued therein, but no property sought to be reached by the present suit has been levied upon, *held*, demurrable, for the reason that plaintiff has neither exhausted nor fully made use of the legal remedies afforded in such pending action.

—Bruce v. Hoidal, 362.

The rule appears well settled that, in a creditor's bill, the complaint must show that the creditor has exhausted his remedy at law, or at least proceeded far enough to have obtained a judgment against defendant or a lien on the property by him fraudulently attempted to be covered up. However, where it appears that the remedy at law is unavailing, because the debtor has absconded or is a nonresident, equity will give relief.

—Bruce v. Hoidal, 364.

CRIMINAL LAW.

ATTEMPT TO COMMIT A CRIME.

An attempt to commit a crime is an attempt to do the act constituting the crime, coupled with the doing of the act or acts tending to consummate such intention, but ineffectual as a matter of fact.

—State v. Smith, 110.

BURDEN OF PROOF.

In cases of homicide or assault, no burden rests upon defendant to prove that his act was justifiable, because in self-defense; but the jury, to convict, must be satisfied beyond a reasonable doubt that the act was

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CRIMINAL LAW—Continued.

not justifiable on such ground. In this case, *held* error to refuse defendant's request for an instruction to that effect; the matter not being so specifically covered in the general charge as to make it reasonably certain that the jury was not misled.

—State v. McGrath, 321.

In the case of the defenses of insanity or intoxication, the burden is upon defendant by virtue of our statute.

—State v. McGrath, 323.

JUDGMENT AND SENTENCE.

The office of a judicial sentence is now and always has been merely to direct that the punishment provided by the law be administered to the person convicted of the crime.

—State ex rel. v. Wolfer, 375.

We have no statute in this state requiring that the judgment shall contain anything whatever concerning the age of the prisoner, and in the absence of such a statute we do not think any recital in this regard is necessary in order to validate a sentence to the reformatory.

—State ex rel. v. Wolfer, 371.

Bitter attacks have been made upon the so-called indeterminate sentence system, with its credits for good behavior, upon the parole system, and upon the prison transfer system; such attacks being grounded variously upon the contention that the legislation assailed attempts to vest administrative officers with the judicial power of sentence or the executive power of pardon, or else is an unauthorized delegation of legislative powers. In each of these cases the indeterminate sentence system was sustained.

—State ex rel. v. Wolfer, 372, 373.

The ancient conception of "punishment" was deemed to be, as the word implies, largely compensatory and nicely graduated to the nature and circumstances of the offense; this idea being reflected in the Constitutions of some of the states that the punishment shall be proportionate to the offense. The modern conception of punishment which, so far as we can ascertain, has always obtained in this state, takes practically no account of compensation; the only survival thereof being found in the attempt at prevention by means of deterring examples and by confinement of and restraint upon criminals considered dangerous to be at large.

—State ex rel. v. Wolfer, 372, 375, 376.

One of the principal aims, if indeed not the predominant one, of our penal system is reform. Practically every law enacted in this state for many years, relative to sentence and imprisonment for crime, evidences this aim; and this conception of "punishment" of necessity

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CRIMINAL LAW—Continued.

involves an extension of the administrative side of the penal system, and imperatively demands greater freedom and wider powers on the part of the executive and administrative officers in carrying out the sentence of the courts.

—State ex rel. v. Wolfer, 375.

The changes in the conception of punishment and of sentence for crime necessarily require that the constitutional division of government into three departments should receive, so far as the present question is concerned, a more liberal construction than might have been logically possible when the provision was inserted in the first American Constitution.

—State ex rel. v. Wolfer, 377.

APPEAL AND ERROR.

An alleged error that the court referred to the statements of defendant to certain witnesses as being admissions instead of confessions, and that the jury was thus misled, is unavailing on appeal, unless it is called to the attention of the court when the jury is charged.

—State v. Smith, 111, 112.

In a prosecution for the obstruction of a public highway the state offered evidence tending to show that the locus in quo had been lawfully laid out as a public highway, and also evidence tending to show the establishment of a highway by user under the statute. The proceedings for laying out the highway by the public authorities were void for indefiniteness in the description of the road, and were erroneously received in evidence. It is *held*, since the record does not disclose whether the conviction of defendant was predicated upon the evidence tending to show a lawfully established highway by the public authorities, or upon a highway acquired by user, the latter not conclusively appearing from the evidence, that the judgment of conviction cannot stand, and must be reversed.

—State v. Hager, 512.

TRANSFER OF PRISONERS.

We think the power of transfer of prisoners from the reformatory to the state prison conferred by section 5455, as amended by Laws 1911, p. 80, c. 61, is purely administrative.

—State ex rel. v. Wolfer, 375, 377.

CUSTOM.

The general custom and usage according to which a business, as for instance that of banking, is carried on in a state becomes in the nature of a law pertaining thereto, so that parties may be said to contract with reference to it.

—Taylor v. First National Bank of Minneapolis, 528.

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DAMAGES.

LIQUIDATED DAMAGES.

The rule in Carter v. Strom, 41 Minn. 522, 43 N. W. 394, that where a given sum is specified in a contract as liquidated damages (the contract containing various stipulations to all of which the clause as to damages is clearly applicable), the amount specified is to be regarded as a penalty, and not as liquidated damages, is stated in the abstract, and its application manifestly depends largely upon the intention of the parties as to what provision of their contract the stipulation as to damagee is designed to apply.

—Berghuis v. Schultz, 92, 93.

Provision in a contract for the payment of a certain sum by the seller of a mercantile business in the event of his violation of the terms of the contract, *held*, to be a stipulation for liquidated damages, and not for a penalty.

—Berghuis v. Schultz, 87.

INJURY TO REAL PROPERTY.

A permanent injury to real property, as distinguished from a temporary or continuing injury, is one of such a character, and existing under such circumstances, that it will be presumed to continue indefinitely. A temporary or continuing injury is one that may be abated or discontinued at any time.

—Worden v. Bielenberg, 330.

INJURY TO TREES.

The true measure of the damages for the injury to and destruction of standing forest trees by fire, is the diminution in the value of the land caused by such injury.

—Reynolds v. Great Northern Railway Co. 251.

Instructions in an action based upon injury to and destruction of standing forest trees and fallen timber, by fire set by the defendant's negligence, considered and *held* to give the plaintiff full benefit of his contention that he was entitled to recover for the destruction of the fallen timber in its condition as it then lay on the ground, as well as for the injury to the standing trees.

—Reynolds v. Great Northern Railway Co. 251.

In an action based upon the destruction of standing forest timber by fire, evidence of the value of the timber itself is admissible, not as defining the measure of damages, which is the diminution of the value of the land, but as being proper to be considered by the jury in applying the true measure and ascertaining the amount of the damages suffered.

—Reynolds v. Great Northern Railway Co. 251.

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DAMAGES—Continued.

Damages for the destruction by fire of standing fallen timber, *held* not so manifestly insufficient as to require interference with the verdict awarding the same.

—Reynolds v. Great Northern Railway Co. 251.

BREACH OF CONTRACT.

In an action for fraud in the exchange of automobiles the measure of damages was the difference between the actual value of the car and the contract price.

—Jones v. Magoon, 438.

IN ACTIONS FOR PERSONAL INJURY OR DEATH.

The question whether damages for mental anguish or humiliation, resulting solely from the disfigurement of the person, are not recoverable because such mental anguish is considered a sentimental state of mind and too remote from the original injury to constitute an element of damages, is not ruled either way by any decisions of this court. The authorities elsewhere are in conflict.

—Johnson v. Forrestal, 204, 205.

Where a young man of twenty-two years was painfully and seriously injured, and the evidence would warrant a finding that he would suffer pain in the future, the court *held*, considering his loss of wages before the trial, the character and extent of his injuries, and the pain, that an award of $2,900 was not so excessive as to justify interference, after its approval by the trial court.

—Johnson v. Forrestal, 205.

Action for death of plaintiff's intestate. Verdict for $3,750. Deceased was thirty-three years old, left two children living with their mother, his divorced wife, and was earning $75 per month. *Held:* The award of damages was liberal, but not so excessive as to justify any interference with it by this court.

—Lane v. Northern Pacific Railway Co. 260.

Action for personal injury. Verdict in favor of plaintiff for $1,000, reduced to $750 by the court. *Held:* That the evidence tended to show the injuries were severe, but not permanent; that plaintiff suffered great pain and special damages to the amount of $200; and the reduced award was only fairly compensatory.

—Wiggin v. Northwest Paper Co. 277.

Action for personal injury. Plaintiff, a young woman about 23, was earning $35 per month at the time of the accident. Six months afterwards she was unable to perform any services. She was severely injured and subjected to much physical and mental suffering. Evidence of s

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DAMAGES—Continued.

complete recovery was convincing. Verdict of $7,500 *held* excessive and reduced to $5,500.

—Weiss v. Great Northern Railway Co. 361.

Action for personal injury. Verdict in favor of plaintiff for $2,450. Plaintiff, a farmer, broke a rib, seriously injured his back and hip bone, causing severe pain. He was in bed two weeks and has not been able to do any work since, as it hurt his backbone. At the trial there was medical testimony that there was a weakness of the hip and the possibility, in time, of the hardening of the tissues and excruciating pain, and such result might be permanent. *Held:* The award of damages was liberal, but not so excessive as to justify interference with it by this court.

—Stuhr v. Wright County Telephone Co. 512.

DEATH.

The presumption that a person who was killed by a train while crossing a railroad track at a street intersection exercised due care for his safety contains no elements differentiating it from the ordinary presumption of right conduct, and is not conclusive. It may be overcome by direct evidence, or by facts and circumstances clearly showing a failure to exercise due care.

—Nelson v. Northern Pacific Railway Co. 347.

Force and effect will be given the evidence tending to overcome the presumption, whether it appears from the plaintiff's case in chief or from that offered by defendant.

—Nelson v. North Pacific Railway Co. 347.

DEED.

In this an action to set aside a deed to a daughter of the grantor, the evidence sustains the finding of the jury that the grantor was competent, and also that no undue influence was exerted upon him.

—McEleney v. Donovan, 294.

The jury were properly instructed that the burden was on plaintiff to prove the incompetency of grantor and the undue influence alleged; also that there was not any evidence of fiduciary relations, or relations of confidence and trust, between grantor and grantee, that would give rise to the presumption that undue influence had been used by or in behalf of the grantee.

—McEleney v. Donovan, 294, 300.

The trial court did not err in refusing to permit the attorney who prepared the deed to answer whether the grantor gave any reason for disinheriting all his children and giving all his property to one, and in

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DEED—Continued.

allowing him to answer whether the granter stated any reason why he made the deed at that time.

—McEleney v. Donovan, 298.

DIVORCE.

DEFENSE.

Insanity is a defense to an action for a divorce on the ground of cruel and inhuman treatment, if at the time the alleged acts of cruelty were committed the defendant was laboring under a defect of reason as not to know the nature of his acts or that they were wrong. R. L. 1905, § 4756. The mere fact that defendant had been adjudged insane and committed to the hospital for treatment is not sufficient to bring this case within this rule.

—Longbotham v. Longbotham, 139.

PLEADING.

Appeal from a judgment granting the plaintiff an absolute divorce on the ground of defendant's cruel and inhuman treatment of her. *Held:* The trial court did not abuse its discretion in denying defendant's application at the trial to amend his answer by substituting new issues.

—Longbotham v. Longbotham, 139.

EVIDENCE.

The fact that defendant had been adjudged insane and committed to the hospital for treatment does not necessarily establish that he was insane, when the several acts of cruelty were committed.

—Longbotham v. Longbotham, 142.

The findings of fact are justified by the evidence, and they support the conclusions of law and the judgment.

—Longbotham v. Longbotham, 139.

ALIMONY AND ALLOWANCE.

The district court is authorized to award to the wife as permanent alimony a gross sum and make it a lien on the husband's real estate, or to give her specific part of his real and personal property, or an undivided part or interest in the whole thereof, as may be found for the best interests of the wife under the circumstances of each case. R. L. 1905, § 3590. But it should award to the wife an undivided part of the husband's property with caution, for the tendency of such an award is to excite strife between the divorced parties.

—Longbotham v. Longbotham, 139, 143.

Alimony is not awarded as a penalty but as a substitute for marital support. It is wholly statutory, as is also its modification, its allow-

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DIVORCE—Continued.

ance in the first place being governed by R. L. 1905, § 3590, and revision of judgments for alimony being governed by section 3592.
—Haskell v. Haskell, 487.

While the necessities of the wife constitute an important consideration, there must also be considered, in determining the amount of alimony, either upon an original application therefor or upon a motion to increase or decrease, the financial ability of the husband to pay.
—Haskell v. Haskell, 488.

While an application for the revision of a judgment for alimony, on the grounds of changed financial condition of the parties, should be entertained with great caution, nevertheless, where the change is not wilfully brought about by the applicant, the motion should be disposed of under the same rules applicable upon an original application to fix the amount of alimony, and a modification of the former judgment may be made on account of the changed financial condition of either or both of the parties.
—Haskell v. Haskell, 484.

An order denying an application for a reduction of alimony, on the ground of the changed financial condition of the parties, *held* erroneous.
—Haskell v. Haskell, 484.

The word "part," in R. L. 1905, § 3590, is used in its broadest sense and as the equivalent of share or portion.
—Longbotham v. Longbotham, 143.

SUPPORT OF CHILD.

Under R. L. 1905, § 3590, the trial court has no authority to make an allowance for the support of a minor son a lien on the personal property of the husband.
—Longbotham v. Longbotham, 144.

The authority of the court to make its decree for alimony or allowances a lien on the property of the husband is purely statutory. Our statute, by necessary implications, limits the right to real estate. But the court may provide for execution against both real and personal property to enforce payment of the amount awarded.
—Longbotham v. Longbotham, 144.

DITCH.

See Drain.

DRAIN.

Whether failure to post notice of hearing on the engineer's and viewers' reports for the requisite number of days before the hearing ousted the-

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DRAIN—Continued.

commissioners' jurisdiction, if they had acquired it by the due notice of the hearing on a proper petition for the ditch; or whether they could not obtain jurisdiction because the notice was not posted the length of time required; or whether plaintiff, being a nonresident, the service of the notice by mail, as required by the statute, was sufficient to give jurisdiction as to her interest in the lands—are not considered.

—Geib v. County of Morrison, 264.

APPEAL FROM REPORT OF VIEWERS.

On the trial of an appeal from the report of the viewers in drainage proceedings, the instructions of the trial court are construed, and *held* to have in effect laid before the jury for consideration the determination of the viewers in the matter of the assessment of benefits, and, as so construed, the instructions were prejudicial to appellants.

—Dodge v. County of Martin, 392.

Such appeals bring the matter of damages and benefits before the court for trial de novo, and the amount awarded by the viewers is not a proper matter for consideration by the jury.

—Dodge v. County of Martin, 392.

The object of the law in granting the right of appeal is to afford the appellant the right to the independent judgment of a jury, uninfluenced by the result from which the appeal was taken. If in any such case the jury, by the charge of the court or otherwise, is led to the conclusion that consideration and respect should be given to the assessment made by the viewers, the appellant is deprived of his right to the separate opinion of the jury, and his appeal becomes fruitless.

—Dodge v. County of Martin, 394.

The jury could not properly consider the viewers' report upon the issue to be by them decided. Counsel could not refer to such report without error. For a stronger reason instructions by the court would constitute error.

—Dodge v. County of Martin, 395.

OBJECTIONS TO ASSESSMENT.

R. L. 1905, § 919, relative to defenses which may be made upon an application for judgment on a tax assessment, applies to ditch assessments.

—Jacobson v. County of Lac qui Parle, 14.

Objections that a ditch fails to furnish the drainage contemplated and intended at the time of making the assessment; that the land is no better drained than before the improvement was constructed; that no provision is made for caring for surface water discharged in wet seasons in a natural watercourse upon the objector's land, are not of a kind that can

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DRAIN—Continued.

be made after the expense of constructing the ditch has been incurred, for the objections are based on matters that were necessarily involved in the original petition, report of the viewers, and order establishing the ditch.

—Jacobson v. County of Lac qui Parle, 15, 18.

If matters of this kind were open to question under R. L. 1905, § 919, the result would be that the merits of ditch assessments would have to be retried every time any landowner saw fit to object to an application for judgment upon an assessment on the ground that the ditch did not perform the function anticipated, and we do not deem this to be the law.

—Jacobson v. County of Lac qui Parle, 18.

Under R. L. 1905, §§ 2587, 2588 and 2590, it must be held that, after the making of the order establishing the ditch, the assessment should be conclusively presumed to have been made on the basis of the engineer's survey and report, and not on his declaration or upon other collateral matters.

—Jacobson v. County of Lac qui Parle, 19.

The matter of the sufficiency of a drain and the resulting benefits therefrom must necessarily depend upon estimates and judgment formed before such matters have been tested by actual results, and, in the absence of fraud or mistake other than of judgment, such matter is concluded by the ditch proceedings.

—Jacobson v. County of Lac qui Parle, 19.

In proceedings to construct ditches, the time for taking an appeal from the levy of an assessment for such work, cannot be extended.

—Jacobson v. County of Lac qui Parle, 19.

NOTICE OF PROCEEDING.

A finding that the proceedings to establish a drain under Laws 1905, p. 303, c. 230, were regular is not impugned by another finding that certain proof of the publishing or posting of a required notice is lacking or insufficient, for the statute does not require proof of the publication, mailing or posting of the notices therein specified to be filed or preserved in the records of the proceedings.

—Geib v. County of Morrison, 261.

ACTION TO VACATE ASSESSMENT.

The plaintiff, in an action to vacate a ditch assessment and to enjoin the enforcement thereof, stands, at most, in no better position to attack

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DRAIN—Continued.

such assessment than he would if he were objecting to the entry of judgment on the first instalment thereof, under R. L. 1905, § 919.

—Jacobson v. County of Lac qui Parle, 14.

In the absence of an appeal, and of fraud or demonstrable mistake, the county board's confirmation of a ditch assessment, made under R. L. 1905, § 2586, et seq., is conclusive of the utility of the ditch and the benefits conferred thereby.

—Jacobson v. County of Lac qui Parle, 14.

Complaint in an action to vacate a ditch assessment *held* to allege neither fraud nor demonstrable mistake, and to be obnoxious to a general demurrer.

—Jacobson v. County of Lac qui Parle, 14.

A person who, with knowledge of the proceedings to establish a public drain which benefits his lands, stands by while such drain is being constructed, knowing that the expense thereof must be assessed against the land benefited, cannot, after the lapse of more than three years, invoke the equity powers of the court to remove the cloud cast upon his lands by the assessment made in the proceedings on the ground that these were without jurisdiction. In this case, plaintiff was a nonresident.

—Geib v. County of Morrison, 261.

EJECTMENT.

Action to recover possession of land. Findings that plaintiffs were the owners in fee of the land and entitled to the possession thereof, which was wrongfully withheld from them by defendant. *Held:* The findings of fact are sustained by the evidence.

—Hayes v. Hayes, 1.

Action to recover possession of a strip of land over which a public highway originally ran. The plaintiff, or those through whom she claims, conveyed by several deeds all of the land abutting on the highway before it was vacated, and after it was vacated this action was brought. The trial court found that the plaintiff had not proven the allegations of her complaint as to her ownership of the land. Evidence, including the deeds, construed, and *held*, that it sustains the finding. The trial court did not err in excluding evidence as to the subsequent acts of the parties to the deeds.

—Pratt v. Quirk, 316.

ELECTION.

RIGHT TO VOTE.

Our Constitution guarantees the right of a qualified elector to vote at any

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ELECTION—Continued.

election, defines the qualifications of an elector, and the conditions of eligibility to office, which cannot be changed or added to by statute.

—State ex rel. v. Erickson, 152.

The legislature may make and impose such reasonable regulations which it deems necessary to secure a pure and orderly election and to guard against unfair combinations, undue influence, and coercion, although they may incidentally affect the right of an elector to vote or his opportunities for securing an election to office; but they must be reasonable, uniform, and impartial, and must not be such as to defeat indirectly the constitutional rights of an elector or unnecessarily obstruct the exercise thereof.

—State ex rel. v. Erickson, 152.

NOTICE OF CONTEST.

The court, by virtue of Laws 1911, p. 78, c. 59, acquires jurisdiction to hear and determine an election contest by the filing of notice of contest and appeal with the clerk of the court within ten days after the canvass of the votes. Service of the notice must be made on the contestee before the court can proceed to hear and determine the matter, but the statute does not limit the time in which this must be done.

—Walden v. Calef, 165.

It is, however, the duty of the contestant, after the court has acquired jurisdiction of the contest, to apply promptly for an order fixing the manner and the time within which the notice must be served. If he fails so to do, and to serve the notice within a reasonable time, the court may, and should on motion, dismiss the contest for inexcusable delay in prosecuting it, but, until so dismissed, the court retains jurisdiction of the subject-matter of the contest, and it may, in its discretion, make such reasonable order as to the service of the notice as it deems just.

—Walden v. Calef, 165.

The notice herein was duly filed and personally served on the contestee within ten days after the canvass, but before any order was made by the court as to such service. The contestee specially appeared at the time fixed for hearing the contest, and moved the court to dismiss all the proceedings for the reason that the court had no jurisdiction over him. The court confirmed the service of notice, and ordered that it stand as the service ordered by the court, and informed the contestee that the hearing would be continued to enable him to prepare for trial if he so desired. *Held*, that it was not error to deny the motion.

—Walden v. Calef, 165.

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ELECTION—Continued.

PRIMARY ELECTION.

A primary election, which is purely of statutory origin, is the selection, by qualified voters, of candidates for the respective offices to be filled; but an election, which has its origin in the Constitution, is the selection by such voters of officers to discharge the duties of such offices. Statutory regulations applicable only to primary elections, which might be repugnant to the Constitution if extended to elections, are not necessarily invalid unless they are so onerous, unfair, or obstructive as practically to defeat the fair right of an elector to vote or to be elected to office.

—State ex rel. v. Erickson, 152.

The provisions, as to classifying of candidates, have not been extended to official election ballots, for they begin and end with the primary election statute. Whether they would be constitutional, if extended to official election ballots, is neither considered or decided.

—State ex rel. v. Erickson, 152, 157.

Held: (1) August 28, 1912, was the last day for filing with the secretary of state the affidavit for nomination as candidate for representative to the legislature to be placed on the ballot for the primary election on September 17 in that year, and (2) relator's affidavit, in designating the class as "A" instead of "1," was a substantial compliance with the statute. Laws 1912, p. 4, c. 2.

—Cashman v. Schmahl, 159.

Held: (1) August 28, 1912, was the last day for filing with the secretary of state the affidavit for nomination as candidate for representative to the legislature to be placed on the ballot for the primary election on September 17 in that year, and (2) relator's affidavit, in designating the class as "B" instead of "2," was a substantial compliance with the statute. Laws 1912, p. 4, c. 2.

—Winship v. Schmahl, 161.

Assuming that an intent to deceive the voters into the belief that a certain publication was a sheet from a certain newspaper would make the publication a violation of Laws 1912, p. 23, c. 3, the finding that there was no such intent was sustained by the evidence.

—Harrison v. Nimocks, 535.

The failure of a candidate for the legislature to file the names of his campaign committee is not a violation of law, where the evidence fails to show that the committee expended money.

—Harrison v. Nimocks, 535.

The question here is whether contestee violated the law and not whether his opponent did.

—Harrison v. Nimocks, 535.

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ELECTION—Continued.

It was proper to make the opponent of the contestee a party to the proceedings, but the inquiry into his conduct would only be material in case it were found that contestee was guilty, and then not to palliate that guilt, but to determine that the opponent was entitled to be declared the nominee.

—Harrison v. Nimocks, 535.

The contestee was charged with expenditures of money exceeding the limit placed by Laws 1912, p. 23, c. 3. *Held*, the evidence did not require setting aside the findings of the trial court.

—Harrison v. Nimocks, 535.

ACT OF 1912.

The provisions of the primary election statute of 1912 [p. 4, c. 2] as to classifying of candidates, are not repugnant to the guaranties of the Constitution as to the right to vote and eligibility to office, and the statute in this respect is not unconstitutional.

—State ex rel. v. Erickson, 152.

The first twelve sections of the primary election act of 1912 are amendments to the original primary election law (see R. L. 1905, §§ 181–201) and must be so construed.

—State ex rel. v. Erickson, 157.

Laws 1912, p. 4, c. 2, repeals former statutory provisions as to the nomination of candidates for state office by party conventions and in this respect is valid. No political party now has the right to nominate candidates for state office by a party convention.

—Johnson v. Schmahl, 179.

ELECTRICITY.

A public service corporation, which has accepted a franchise from a city authorizing it to operate therein, is bound by the implication of the law to make no unreasonable discriminations between those to whom service is or is not to be furnished; that is, it must not be partial and must serve all alike who are similarly circumstanced with reference to its system or who are members of any class which it has undertaken or is otherwise bound to serve. This rule is almost universally applied to telephone companies, water companies and electric light companies.

—State ex rel. v. Consumers Power Co. 225.

A corporation organized to supply electric service to the cities of the state and the inhabitants of such cities, is a public service corporation within the rule above announced; especially in view of R. L. 1905, § 2927, giving such a corporation the right to use the highways of the

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ELECTRICITY—Continued.

state for the purpose of constructing its lines, and of the fact that such service is a public service in aid of which the power of eminent domain may be exercised.

—State ex rel. v. Consumers Power Co. 225.

Evidence in mandamus to compel an electric light company to furnish electric service to relator's house, considered, and *held* to show that such house was situated within a zone of service already established by the respondent, and was therefore prima facie entitled to the same service furnished to other houses within the same zone.

—State ex rel. v. Consumers Power Co. 225.

It is unreasonable discrimination for an electric light company to require an applicant for service to procure for it a right of way to his premises, when such condition is not imposed upon other applicants and patrons.

—State ex rel. v. Consumers Power Co. 225.

A provision in an ordinance granting a franchise to an electric-light company, that the city should not require the company to make "extensions" except upon certain conditions, *held* not to affect the right of a resident in an established service zone to invoke the aid of the courts to compel the company to connect his premises with its line.

—State ex rel. v. Consumers Power Co. 225.

Such provision held not to affect the mutual rights and obligations of the company and the individual residents of an established service zone.

—State ex rel. v. Consumers Power Co. 225.

EVIDENCE.

JUDICIAL NOTICE.

The court will judicially notice that when an application is made to a public service corporation for a public service such as water, gas, electric light or power, or telephone service, certain things have to be done in order to connect the applicant's premises with the company's system, and that the company, and not the applicant, usually attends to such matters, except in so far as they may be controlled by special rules and regulations applicable to the particular service.

—State ex rel. v. Consumers Power Co. 225.

The court will judicially notice that cities are divided by streets and alleys into blocks and subdivisions of blocks; that public service corporations using wires for the distribution of the service supplied by them, such as telephone and electric-light service, customarily set poles in the streets and alleys and string wires along and across the same, that such wires frequently cross the streets and alleys; that many persons are served by such wires so strung above and across the streets and

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EVIDENCE—Continued.

alleys; and when the consent of the city is necessary in order that the service company may lawfully set such poles and string such wires as may be necessary to carry the service to the persons so served and to be served, the company, and not its patrons or applicants for service, usually attends to the obtaining of the necessary consent of the city to the use of the streets, by application to the council or otherwise.

—State ex rel. v. Consumers Power Co. 225.

BURDEN OF PROOF.

The burden of proof in every case rests on the litigant who has the affirmative of a view to prove it; otherwise his opponent wins. It seems neither useful nor proper to inquire how he maintained this burden at any particular stage in the trial. The important consideration is: Where is he left when all the evidence is in? Does the fair preponderance thereof then establish the issues he by his pleadings undertook to establish?

—McEleney v. Donovan, 300.

ADMISSIONS.

Admissions against interest are admissible against the one making them, although the spouse of such person is a party to the action, and do not come within the inhibition of R. L. 1905, § 4660, which prohibits one spouse from testifying in a case where the other spouse is a party without the latter's consent.

—Kanne v. Kanne, 265, 269.

DOCUMENTARY EVIDENCE—COURT RECORDS.

All that is necessary to prove the minutes of a court is a copy thereof, attested by the clerk and under the seal of the court.

—State ex rel. v. Kelly, 371.

PAROL EVIDENCE—WRITINGS.

The written executory order for the shipment of goods to defendant, set out in the opinion, *held* not on its face a complete expression of the contract between the parties, and that evidence of a contemporaneous parol warranty of the goods was admissible. Aultman, Miller & Co. v. Clifford, 55 Minn. 159, 56 N. W. 593; Phœnix Pub. Co. v. Riverside Clothing Co. 54 Minn. 205, 55 N. W. 912; and Boynton Furnace Co. v. Clark, 42 Minn. 335, 44 N. W. 121; followed and applied.

—McLoone v. Brusch, 286.

OPINION EVIDENCE.

A witness who has had business transactions with a person, has known

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EVIDENCE—Continued.

him, and observed and talked with him, may, after having detailed the business had and observations made of such person, properly give an opinion concerning his mental state.

—McEleney v. Donovan, 294.

EXECUTOR AND ADMINISTRATOR.

ALLOWANCE TO WIDOW.

Under section 3653, R. L. 1905, the allowance to the widow of the personal wearing apparel and a limited amount of the household goods from the husband's estate is confined to the articles specified, and she has no right to select money or other property in lieu thereof.

—Stromberg v. Stromberg, 325.

The widow of a nonresident decedent is entitled to the statutory allowance out of the property of her husband found in this state, where it appears that her husband left no other property whatever.

—Stromberg v. Stromberg, 325.

The widow may select the additional allowance of $500 in money or any other form of personal property of her deceased husband.

—Stromberg v. Stromberg, 326.

The part of the personal estate to which the surviving widow is entitled by statute is not to be included in the estate administered upon, and is not subject to the expenses of administration or the payment of proved claims, and is no part of the residue to be distributed. All that the probate court is called upon to do with relation to such property is to segregate it from the rest of the estate and order the executor or administrator to deliver it to the widow.

—Stromberg v. Stromberg, 327.

The fiction of law that the situs of the personal property of a nonresident decedent is in the state or country of his domicil is only for the purpose of distributing the residue of the estate, subject to the expenses of administration and the rights of creditors, in the state where the property is actually found. Property not subject to administration or distribution need have no situs by fiction of law to come into possession of the true owner.

—Stromberg v. Stromberg, 328.

In view of the fact that enactments of similar import to section 3653 are found so generally upon the statutes of sister states, it would seem that by comity we should extend to a widow who comes into the state where the only property of her deceased husband is found, the same right she would have had if both she and her deceased husband were domiciled here.

—Stromberg v. Stromberg, 329.

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EXECUTOR AND ADMINISTRATOR—Continued.

ACTION FOR SERVICES RENDERED TO TESTATOR.

Appeal from an order denying appellant's motion for judgment notwithstanding the verdict or for a new trial, in an action against the executors for the value of personal services rendered by respondent to their testator. *Held*, that the motion for judgment was correctly denied, but that it was error to deny the motion for a new trial because of error in the admission of evidence, and for the reason that the verdict was so manifestly against the preponderance of the evidence that it was an abuse of discretion not to submit the case to another jury.
—Meehan v. Meehan, 35.

It was error to admit evidence as to advice given by the witness to claimant not to antagonize his uncle (the decedent), as the latter might do well for him in years to come.
—Meehan v. Meehan, 39.

Evidence as to what the deceased said with reference to providing in his will for plaintiff was correctly received, because it was communicated to the claimant.
—Meehan v. Meehan, 39.

EXPLOSIVE SUBSTANCE.

Defendant kept a quantity of explosive fuse caps in a tool house on a lot in the city. Boys went into the tool house through an opening in the loose stones used as a foundation, took the caps, and threw them on the ground outside of the house. Plaintiff's six-year-old son, in playing about the premises, found one of the caps, and was injured by its explosion while he was playing with it. It is *held:*

1. The evidence sustains a finding that the defendant was negligent in storing the fuse caps in the tool house without sufficient precautions to prevent children from entering and taking them.
2. There is no distinction between the care required of sticks of dynamite and of fuse caps. The doctrine of the turntable cases is applicable. Mattson v. Minnesota & North Wisconsin R. Co. 95 Minn. 477, 104 N. W. 443, followed.
3. It was a question for the jury whether there was an intervening, independent cause, or whether such negligence was the proximate cause of the injury, and the evidence sustains the verdict on this point.
—Vills v. City of Cloquet, 277.

FRAUD.

Where one deliberately makes a false representation of a material fact, or as of his own knowledge without knowing whether it is true or false,

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FRAUD—Continued.

intending that another shall act upon it, and he does so to his injury, an action for deceit lies.

—Flaherty v. Till, 191.

Defendant undertook to give advice and treatment to plaintiff, who was suffering from irritation of his stomach. For the purpose of deceiving plaintiff, he made a pretended diagnosis, advised that the proper treatment was to cover a large part of the body with a plaster, and represented of his own knowledge that the treatment would have no injurious effect and would cure plaintiff's ailment. At the time of making such representations defendant knew they were false and made them for the purpose of deceiving plaintiff. Plaintiff relied upon the false representations, submitted to the treatment and was injured in health. *Held*, a complaint which alleged these facts stated a cause of action for deceit, although it did not allege that defendant obtained any money from plaintiff by the alleged deceit.

—Flaherty v. Till, 191.

Action for fraud in exchange of automobiles. That plaintiff offered to return the car and demanded a return of the property he parted with, while defendants refused to accept a return of the car or surrender the property they had received, does not constitute a rescission of the contract, but only an attempted rescission. Such an attempted rescission of the contract *held* not to bar an action for damages for the fraud.

—Jones v. Magoon, 434, 437.

PLEADING.

An allegation in the complaint that plaintiff relied upon and was induced by the representations to enter into the contract is equivalent to an allegation that plaintiff "believed" the representations to be true, if such an allegation be necessary in an action of this kind.

—Jones v. Magoon, 434, 437.

Complaint construed, and *held* to state a cause of action to recover damages which resulted from alleged fraudulent and illegal acts of defendant in procuring a loan from plaintiff to be made to an insolvent borrower for defendant's purposes.

—Merchants & Miners State Bank of Hibbing v. Chisholm, 459.

EVIDENCE.

In an action for damages on the ground that defendant had made false representations regarding the condition, soil, and previous crop of a farm traded by defendant to plaintiff, *held*, that the evidence sustains the verdict.

—Schmeisser v. Albinson, 428.

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FRAUD—Continued.

There was no error in an instruction to the jury that representations made to the wife of plaintiff would be the same as if made to the plaintiff, if they found that plaintiff was a man that listened to and was governed by his wife's directions, and that the defendant knew or had reason to believe such to be the situation.

—Schmeisser v. Albinson, 428.

In an action for fraud and deceit alleged to have been practised in an automobile exchange, it is *held* that, although the usual question in such cases, namely, what was the value of the car in its actual condition was not put to any of the witnesses, the testimony was founded on that inquiry, and the evidence was sufficient to support the verdict, and there was no error in submitting to the jury the question whether the car was equipped with "exide" batteries.

—Jones v. Magoon, 437, 438.

FRAUDS (STATUTE OF).

A contract, required by the statute of frauds to be in writing and executed in a particular manner, can only be changed or modified subsequent to its execution by a writing of equal solemnity duly signed and executed by the parties, except perhaps in cases where the doctrine of equitable estoppel applies. But the rule does not apply to the discharge of one party from his personal liability under the contract, its terms not being modified.

—First National Bank of Benson v. Gallagher, 464.

PROMISE TO ANSWER FOR DEBT OF ANOTHER.

The appeal bond in this case considered as a common-law obligation is not void under the statute of frauds for failure to state the consideration, namely, the alleged agreement in full.

—First State Bank of Mountain Lake v. C. E. Stevens Land Co. 209.

AGREEMENT NOT TO BE PERFORMED WITHIN ONE YEAR.

A contract for services, which by its terms shows that it is not to be performed or is incapable of performance within one year from the making thereof, is within the statute of frauds; but a contract for one year's services, commencing on the date on which the contract is made, is not within the statute.

—O'Donnell v. Daily News Co. 378, 385.

Defendant's telegraphic offer of employment, and its letter explanatory thereof, and the plaintiff's telegraphic acceptance, *held* not to be sufficient writings to satisfy the statute of frauds.

—O'Donnell v. Daily News Co. 378.

Where the date for the commencement of the performance of a contract is shown by the same evidence which establishes the contractual con-

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FRAUDS (STATUTE OF)—Continued.

sensus, such date must, for the purpose of determining the applicability of the statute of frauds, be deemed to appear from the terms of the contract.

—O'Donnell v. Daily News Co. 378.

Contract for one year's employment considered, and *held* to show by its terms that the commencement of its performance was to begin in the future, thus bringing it within the operation of the statute of frauds.

—O'Donnell v. Daily News Co. 378.

In determining the applicability of the statute of frauds to a contract of employment, the date of the contract will not be presumed to be the date for the commencement of its performance, where it affirmatively appears from the terms of the contract that a subsequent date therefor is contemplated.

—O'Donnell v. Daily News Co. 378.

The doctrine of de minimis cannot be invoked to avoid the operation of the statute of frauds upon a contract which by its terms is not to be performed within one year.

—O'Donnell v. Daily News Co. 378, 387.

An agreement that a mortgagor should be released from personal liability under a mortgage of real property which was not payable for five years, and in pursuance of such agreement the mortgagor executed his promissory note in favor of plaintiff, was an executed contract, and was not within the statute of frauds.

—First National Bank of Benson v. Gallagher, 466.

GARNISHMENT.

Where, under a policy insuring against loss by reason of the operation of the assured's automobile, an action is brought by a person injured by such automobile against the assured, and the insurance company thereupon takes sole charge of the defense, to the exclusion of the assured, as it had the right to do under the policy, a judgment in the action against the assured becomes, as between plaintiff, defendant, and the company, a liability or debt owing unconditionally by the company to the assured, which such plaintiff may reach by garnishment.

—Patterson v. Adan, 308.

Where defendant had drawn his pay in advance from the garnishee before the garnishee summons was served, the court did not err in discharging the garnishee. It was immaterial that the garnishee city had no right to pay before the end of the month, or defendant to receive his pay.

—Melin v. Stuart, 539.

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GIFT.

We think that, before presumptions of undue influence can be drawn from the fact that a donee is the child of the donor, it must appear that such donee stood to the donor in a relation other than the ordinarily intimate, and even affectionate, relation existing between parent and child. It must be shown that the donee occupied a position to dominate the donor, or exert an influence over him, by virtue of being intrusted with the donor's business affairs.

—McEleney v. Donovan, 301.

Under the contract involved here the vendors agreed to convey the land in consideration of the vendees' agreement to pay $150 annually to the vendors and the survivor during life, and $5,000 to their legal heirs at the death of the survivor of the vendors, with a provision that the vendees had the right at any time prior thereto to pay the vendors $5,500 and obtain a deed and terminate the contract. *Held*, that there was no executed gift to the heirs of the vendors.

—Kanne v. Kanne, 265.

HABEAS CORPUS.

A writ of habeas corpus cannot be allowed to perform the function of a writ of error or appeal.

—State ex rel. v. Wolfer, 370.

Since an appeal in habeas corpus proceedings is, by R. L. 1905, § 4602, required to be tried in this court in the same manner "as if the writ had originally issued out of" this court, errors and irregularities occurring on the trial below need not be considered.

—State ex rel. v. Wolfer, 368.

Where a court has jurisdiction of the person and the subject-matter, and could render a judgment upon a showing of any sufficient state of facts, any judgment which it may render, however erroneous, irregular, or unsupported by evidence, will be sustained as against an attack by habeas corpus.

—State ex rel. v. Wolfer, 368.

Under R. L. 1905, § 5454, authorizing the court to sentence to the reformatory any person not less than sixteen nor more than thirty years of age, etc., who has been convicted of a crime punishable by imprisonment in the state prison, the fact that a judgment of conviction of such a crime, upon which the defendant is sentenced to the reformatory, fails to state the age of the defendant, does not render it subject to attack on habeas corpus.

—State ex rel. v. Wolfer, 368.

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HIGHWAY.

The descripion of a public highway as contained in the petition and final order of the public authorities in proceedings to lay out and establish the same, set out in the opinion, is *held* so indefinite and uncertain as to render the highway proceedings a nullity.

—State v. Hager, 512.

It is well settled by our decisions that a petition in proper form, definitely describing the proposed road, is essential to the jurisdiction of proceedings to lay out and establish a public highway, and that an accurate and definite description thereof is also essential to the validity of the final order of the town or county board, as the case may be. The order must in some manner describe the location of the road so definitely as to enable a person conversant with such matters to trace it out on the ground.

—State v. Hager, 515.

Laws 1899, p. 155, c. 152, providing that public roads, when laid out by supervisors or county commissioners or when used and worked for six years continuously, shall be deemed to be four rods wide cannot apply to a highway established before the passage of the statute.

—State v. Hager, 516.

INDICTMENT AND INFORMATION.

Objections to an indictment for perjury as being indefinite, uncertain, and insufficient to inform the defendant of the crime with which he is charged considered and overruled.

—State v. Smith, 107.

INJUNCTION.

Injunction is not the appropriate remedy available to a village in case of violation of its general ordinances.

—Higgins v. La Croix, 145.

INSURANCE.

The law will indulge in no presumptions favorable to a forfeiture, and the burden to establish one is upon the party invoking it.

—Ibs v. Hartford Life Insurance Co. 113.

Recognition must be taken of the enormous growth of liability insurance of late years. The hazards of modern industries and the risks connected with some of the advantages of present-day life call for this kind of insurance. Policies attempting to fill this demand should, if possible, be construed so as not to be a delusion to those who have bought them. In soliciting business, is it supposable that the company would inform the assured that it assumed no risks if the assured, after accepting the policy, becomes so financially embarrassed that

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INSURANCE—Continued.

no judgment could be enforced against him? Insurance companies of this kind do not, at least openly, ask for the patronage of the insolvent. They profess to give the needed protection to all. Those who procure this kind of insurance have not only their own protection in mind, but also the idea that, if through their involuntary negligence a servant or other person sustains injury, such an one may be recompensed.

—Patterson v. Adan, 312.

If, under the pretense of an insurance obligation, the company carried on litigation in the name of one who has neither voice nor interest therein, which does not affect the company itself, because the assured is unable or unwilling to pay if plaintiff is awarded judgment, it would seem the company becomes an officious intermeddler. Public policy does not permit a litigant to so surrender control of his lawsuit to one who has no interest in the cause of action.

—Patterson v. Adan, 313.

INSURANCE (FIRE).

It is plain that the revisers did not intend to change the law in the matter of payment for partial loss from fire covered by insurance, but only to eliminate superfluous words. R. L. 1905, § 1642.

—Oppenheim v. Fireman's Fund Insurance Co. 423.

A policy of insurance in the standard form must be construed as the voluntary contract of the parties. Kollitz v. Equitable Mut. Fire Ins. Co. 92 Minn. 234, 99 N. W. 892.

—Oppenheim v. Fireman's Fund Insurance Co. 423.

Where the coinsurance clause permitted by R. L. 1905, § 1642, as amended by Laws 1907, p. 639, c. 446, is attached to a policy of fire insurance, and the insured maintains insurance on the building to the amount which he is by such clause required to carry, in case of a total loss the insurable value as stated in the policy, and not the actual value at the time of the fire, is the basis of determining the amount of recovery on the policy.

—Oppenheim v. Fireman's Fund Insurance Co. 417.

In this case the question of whether the loss was total or partial was, under the evidence, one of fact for the jury.

—Oppenheim v. Fireman's Fund Insurance Co. 417.

In determining the actual amount of a partial loss, the insurable value as stated in the policy should not be used as a basis, but the question should be decided upon the evidence before the jury that tends to prove

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INSURANCE (FIRE)—Continued.

what is the amount of the actual loss and damage sustained by the insured from the fire, the actual value of the building at the time of the fire, cost of reconstruction, cost of removing the débris, amount of salvage, all being proper subjects of inquiry.

—Oppenheim v. Fireman's Fund Insurance Co. 417, 425.

If the actual loss is proved to be greater than the amount of the insurance, a reference to arbitrators is not a condition precedent to recovery; but if the actual loss is less than the amount of the insurance, such reference is a condition precedent to recovery.

—Oppenheim v. Fireman's Fund Insurance Co. 417.

COINSURANCE AND CONCURRENT INSURANCE.

There is a wide distinction between "coinsurance" and "concurrent insurance." The latter term has been used from time immemorial to designate insurance placed in other companies covering the same risk. The standard policy permits concurrent insurance. Coinsurance, on the other hand, is a creature of modern invention, at least in this state. When the standard policy law was enacted, and until the act of 1903, it was expressly provided that there should be no coinsurance or other clause in the policy which would reduce the amount payable to the insured in the event of loss to less than the amount of the loss, so long as there was insurance to cover the same.

—Oppenheim v. Fireman's Fund Insurance Co. 420.

There is no coinsurance where the insured does not bear a proportion of the risk himself. When he procures concurrent insurance, and the total amount of all the policies on the property is equal to or greater than the amount which the insured agrees to carry, there is no coinsurance.

—Oppenheim v. Fireman's Fund Insurance Co. 417, 421.

INSURANCE (INDEMNITY).

Under the provisions of its policy of indemnity against loss by reason of liability for personal injuries caused by defendant's automobile, the garnishee company took sole defense of this action and plaintiff recovered a verdict against defendant. Upon appeal from an order denying a new trial, taken by the insurance company, no supersedeas bond was given and judgment was entered in the trial court before determination of the appeal. *Held:* Even if defendant were insolvent and unable to pay the judgment, the insurance company garnisheed was liable to plaintiff for the amount of the judgment. The action

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INSURANCE (INDEMNITY)—Continued.

of the company in assuming exclusive control of the litigation under its contract was a recognition of its liability.

—Patterson v. Adan, 308.

A provision in a policy insuring against automobile accidents that no action shall lie against the company, "unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after trial of the issue," applies only in case the company denies liability and refuses to defend.

—Patterson v. Adan, 308.

INSURANCE (LIFE).

In an action upon an insurance policy, it is *held* that a prima facie valid excuse for an apparent default in the payment of certain dues and assessments was shown by the evidence, and that the court erred in dismissing the action at the close of plaintiff's case.

—Ibs v. Hartford Life Insurance Co. 113.

Where a life insurance company has in its possession or under its control money belonging to the insured, which the policy provides shall be applied in reduction of dues and assessments, it must account for and so apply such money before the company can be heard to declare a forfeiture for the nonpayment of dues.

—Ibs v. Hartford Life Insurance Co. 113.

Whether defendant's call on the insured to pay an assessment at a certain time was unauthorized by the contract of insurance, and whether the insured did not forfeit his rights by reason of his failure to pay dues, which were coupled with the illegal assessment in the "call," is not determined.

—Ibs v. Hartford Life Insurance Co. 116.

INTOXICATING LIQUOR.

In a city election to determine whether license to sell intoxicating liquors shall be granted, ballots on which the voters had written the word "No" opposite the words "In Favor of License," instead of putting a cross opposite the words "Against License," sufficiently express the intention to vote against license, and were properly counted as votes against license.

—Krassin v. City of Waseca, 137.

JUDGMENT.

ESTOPPEL.

A judgment on the merits is conclusive between parties and privies, not only as to every matter which was actually litigated, but also as to every matter which might have been litigated therein.

—White v. Hewitt, 344.

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JUDGMENT—Continued.

In determining whether there is an estoppel by judgment, the findings will be examined to see what was decided, to interpret the judgment.

—White v. Hewitt, 345.

Where the plaintiff, in an action for damages resulting from an overflow caused by the backing up of the water from the defendant's dam, so framed his complaint that he was restricted to proof of certain specific acts as having caused such backing up and overflow, the cause of action was nevertheless predicated upon the defendant's violation of his ultimate duty to so conduct and maintain its dam as not to violate the rights of the plaintiff, whose lands lay further up the river. Hence a judgment in favor of the defendant in such action was a bar to a subsequent action between the same parties for the same relief sought in the former action, though the allegations of the complaint in the second action were sufficiently broad to admit of proof of any and all specific acts or omissions of the defendant in violation of its ultimate obligation to the plaintiff with respect to the maintenance of the dam.

—Liimatainen v. St. Louis River Dam & Improvement Co. 238.

It has long been settled in this state that a single, entire cause of action cannot be split up into several suits, and that one recovery, although it be in part recovery for the entire injury, is effectual as an estoppel. The estoppel must be mutual and bind both parties to the judgment, or it will not be a bar in favor of either.

—Liimatainen v. St. Louis River Dam & Improvement Co. 242.

In this action of partition, the issue was as to whether or not plaintiff had any title to an undivided one-third interest in the land. It is *held* that a judgment in a former action between plaintiff's grantor and others, as plaintiffs, and certain of the defendants in this case, as defendants, estopped plaintiff's grantor and those in privity with him from asserting title to the interest claimed by plaintiff in the case at bar.

—White v. Hewitt, 340.

A prior judgment in an action by the owner of horses against the contractor who hired them to recover a personal judgment for the agreed price of their services, against defendant in this action to establish and foreclose a lien claimed by such owner, is *held* not to estop defendant from now claiming that plaintiffs acquired no lien on the logs; the judgment being merely a personal one against the contractor, and it appearing that the court in such action did not and could not adjudicate such lien.

—McKinnon v. Red River Lumber Co. 479.

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JUDGMENT NOTWITHSTANDING VERDICT.

The rule is thoroughly settled that judgment notwithstanding the verdict is not proper where the evidence offered, if true, establishes a cause of action or where there is a clear conflict in the evidence. Nor is it alone sufficient that the evidence is such that the trial court might properly, in the exercise of its discretion, grant a new trial. If there is some evidence reasonably tending to prove a cause of action, the application should not be granted.

—Berghuis v. Schultz, 93.

Action to recover from the owner of a store building for breach of his contract with plaintiff not to let his store for the purpose of carrying on a general merchandise business. Evidence *held* such that it was error for the trial court to grant the defendant's motion for judgment notwithstanding the verdict.

—Berghuis v. Schultz, 87.

A collision occurred on a dark night in a public highway between the plaintiff's team, driven by him, and the automobile of the defendants, driven by one of them, whereby plaintiff was injured by the alleged negligence of the defendants in not observing the law of the road. A verdict was returned for him, and the trial court ordered judgment for the defendants notwithstanding the verdict. *Held:*

1. It is not alone sufficient to authorize a judgment notwithstanding the verdict that the trial court upon the evidence, in the exercise of a fair discretion, ought to have granted a new trial, for such a judgment can only be ordered when the evidence is a matter of law practically conclusive against the verdict.
2. The evidence does not bring this case within the rule stated, and the court erred in ordering judgment for the defendants.

—Erwin v. Shell, 496.

JURY.

It is settled beyond question that the provision of the constitution (Art. 1, § 4) merely preserves the right to trial by jury as it existed at the time of the adoption of the constitutional provision.

—Peters v. City of Duluth, 101.

LANDLORD AND TENANT.

Where a landlord, in releasing for a valid consideration his tenant from his obligations for the remainder of the term of a lease of a store building, knew that the tenant, in a prior sale of his stock of goods to a third person, had agreed, under condition to pay a certain sum in the event of his default, not to sublet the building for a general merchandise store during the remainder of his term, and it was cov-

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LANDLORD AND TENANT—Continued.

enanted in such agreement of release that the landlord would not let the said store for such purpose during the remainder of the time that the tenant's term would have run, the landlord's violation of such covenant rendered him liable, under the rule of Hadley v. Baxendale, 9 Ex. 341, to the tenant for the amount which the latter, by reason of such violation, was compelled to pay to such third person pursuant to the provisions of the contract for the sale of the goods.

—Berghuis v. Schultz, 87.

CONSTRUCTION AND VALIDITY OF LEASE.

The owner leased certain real property for the term of one hundred years. Subsequently, before the expiration of the lease, he leased it to another for the term of one thousand years; the term thereof commencing immediately. The second lease is construed, and *held* to have been a grant in præsenti, and to vest in the second lessee the control of the property, and the right to the rents and profits issuing therefrom.

—Benjamin v. Northwestern Fire & Marine Insurance Co. 27.

Whether the assignees of the purchaser of the fee occupy the position of subsequent bona fide holders of the legal title, and, as they had no notice of an unrecorded writing directing the tenants then in possession under the prior lease to pay all rent to the holder of the subsequent lease, such assignees are not bound thereby, is not decided.

—Benjamin v. Northwestern Fire & Marine Insurance Co. 31.

The validity of a lease for one thousand years, as a matter of law, cannot seriously be questioned. The parties were competent to enter into the contract, and the forms of law were complied with. No law was violated by the execution of the contract, and it must be held valid, whether it be construed as taking effect at the time of its execution, or at the expiration of the prior lease.

—Benjamin v. Northwestern Fire & Marine Insurance Co. 31.

INJURY FROM DEFECTIVE CONDITION OF PREMISES.

If, at the time of a lease, the demised premises are in a defective and dangerous condition, which is known to the landlord, and concealed from the tenant, the former is liable to the tenant, or his licensee, who, without negligence on his part, is injured by reason of such dangerous condition, although the landlord does not covenant to make repairs.

—Ames v. Brandvold, 521.

It is well settled in this state, and elsewhere, that where there is no agreement by the landlord to repair the demised premises, and he is not guilty of any fraud or concealment as to their safe condition, and the defects in the premises are not secret, but obvious, the tenant takes

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LANDLORD AND TENANT—Continued.

the risk of their safe occupancy, and the landlord is not liable to him or to any person entering under his title or by his invitation, for injuries sustained by reason of their unsafe condition.

—Ames v. Brandvold, 523.

Where a landlord agrees to repair, he is liable for injuries caused to the tenant or his licensees by reason of a defective condition of the demised premises.

—Ames v. Brandvold, 523.

Where a landlord demises premises with a nuisance upon them, he is presumed to authorize its continuance, and is liable to third persons subsequently injured thereby.

—Ames v. Brandvold, 524.

Action against landlord for injury received by licensee of tenant. *Held:* As against a motion for judgment on the pleadings, the complaint was construed to allege that the condition of decayed timbers was known to the landlord and concealed from the tenant at the time the lease was taken, and to be sufficient.

—Ames v. Brandvold, 524.

LIBEL AND SLANDER.

A publication which charges by way of insinuations and comparisons that cause exists for the removal of a public official, because of favoritism, nepotism, and malfeasance in office, is libelous per se.

—Parmelee v. Nottage, 351.

An article stating that it is easy to work the county commissioners *held* actionable; for the word "work," in the connection and manner in which it appears in the publication, conveys a reflection upon the competency and integrity of the officials.

—Parmelee v. Nottage, 351.

A charge need not be made directly—indeed, the venom and sting of an accusation is usually more effective when made by insinuations. The floating calumny which each reader may affix to any and every official act which his aroused suspicions may lay hold of is capable of inflicting graver injury and injustice than a direct, specific charge, which may be squarely met and refuted, if untrue.

—Parmelee v. Nottage, 353.

LICENSE.

REASONABLENESS OF MUNICIPAL ORDINANCE.

In determining whether a license fee of $200 per annum for a permanent moving picture show is unreasonable, evidence may properly be received as to the character and number of the inhabitants of the vil-

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LICENSE—Continued.

lage, its situation, the general character of the exhibitions of the kind in question in similar villages, the crowds attracted, and the need of police surveillance; but *held*, that in this case it was error to receive evidence of the kind of exhibitions carried on by these plaintiffs, and to consider the good quality thereof as controlling on the question of the reasonableness of this, a general ordinance, fixing a license fee for all who might conduct moving picture shows in the village.

—Higgins v. LaCroix, 145.

The license fee mentioned for a permanent moving picture show in a village of one thousand inhabitants is *held* not so excessive as to clearly manifest either a purpose to tax or prohibit under the guise of license; such business being one which is liable to degenerate, is likely to require considerable police surveillance, and which is of a kind wherein regulation and restraint may be imposed in the amount of the license fee itself.

—Higgins v. LaCroix, 145.

These propositions are established by the decisions of this court. A village council may fix a fee for a licensed calling or business which shall include the necessary cost of issuing the license, and the reasonable expense of supervision and police control over the conduct of the calling or business licensed. It has no right to exact or levy a tax under the guise of a license. However, in fixing the license fee the municipality is accorded a wide discretion. Unless the amount is so manifestly unreasonable that there is no escape from the conviction that the power given has been abused or exceeded in fixing a license fee, the court is not authorized to declare the ordinance illegal.

—Higgins v. Lacroix, 149.

LOGS AND LOGGING.

The owner of horses, who hires them to a contractor, the latter using the horses in aid of hauling and banking logs, and the owner performing no manual labor or other service in connection with the logs, is not entitled to a lien on such logs, under R. L. 1905, § 3524.

—McKinnon v. Red River Lumber Co. 479.

An attachment of logs upon which a lien for manual labor is claimed is necessary to an adjudication that plaintiffs have a lien which they are entitled to enforce.

—McKinnon v. Red River Lumber Co. 484.

MANDAMUS.

AGAINST UNINCORPORATED SOCIETY.

A writ of mandamus will issue only to compel the performance by an

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MANDAMUS—Continued.

inferior tribunal, corporation, board, or person of an act which the law specifically enjoins as a duty resulting from an office, trust, or station. Private domestic corporations and their officers are within this rule by virtue of the visitorial power of the state over them; but the writ does not lie to regulate the affairs of unincorporated societies or associations.

—State ex rel. v. Cook, 407.

AGAINST PUBLIC SERVICE CORPORATION.

Mandamus is the proper remedy to compel a public service corporation to furnish service to an individual applicant therefor.

—State ex rel. v. Consumers Power Co. 225.

Where, in mandamus to compel the furnishing of a public service, the respondent fails to establish its affirmative defense, the relator, if he has made out a prima facie case, is entitled to the writ.

—State ex rel. v. Consumers Power Co. 237.

In the absence of evidence of a contrary custom, in mandamus proceedings to compel the furnishing of electric service, it will be presumed that the respondent, an electric-light company, follows the usual custom and itself performs the details incident to the connection of its lines with the premises of applicants for service; and hence where it appears that an applicant for service, whose house is in an established service zone, has made proper application and demand upon the respondent and has his house equipped to receive the service, his right to the writ is prima facie established; the burden of establishing a contrary custom being upon the respondent, as is also the burden of establishing any defense predicated upon its inability, through physicial, legal, financial, or other obstacle, to furnish the service demanded.

—State ex rel. v. Consumers Power Co. 225.

The mandate of a writ of mandamus to compel an electric-light company to furnish electric service to the relator should, under the established facts herein, be merely that the respondent must furnish such service, without specifying the details or manner in which such duty is performed.

—State ex rel. v. Consumers Power Co. 225.

PROCEDURE.

The petition and alternative writ of mandamus constitute, in legal effect, the complaint. The respondent may demur to them.

—State ex rel. v. Cook, 407, 408.

Sections 4558, 4561, 4562, and 4563, R. L. 1905, in many respects assimilate the practice in mandamus to that in ordinary civil actions.

—State ex rel. v. Cook, 408.

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MASTER AND SERVANT.

Liability of Master to Servant.

Evidence in an action by an employee of a mining company against such company and a coemployee of the plaintiff, for injuries sustained by the plaintiff from being thrown from a "dinky" engine while firing the same, *held* sufficient to sustain the finding of the jury, involved in their general verdict in favor of the plaintiff, that both of the defendants were guilty of negligence.

—Millman v. Drake & Stratton Co. 124.

The court properly refused to charge the jury in a personal injury action that, if the jury find that the plaintiff had not been accustomed prior to the time of the accident to put in a fire backing up, or to be off his seat in the engine while they were backing up, and the engineer did not know that plaintiff was doing anything out of the ordinary at the time in question, it would not be negligent for the engineer to run the engine and train at any speed that would not cause any danger of derailment of the engine or cars. Such requested instruction was inaccurate, ambiguous, and misleading.

—Millman v. Drake & Stratton Co. 131.

Safe Place for Work.

A ladder, installed by the defendant in lieu of a stair, *held* to be a stair in the contemplation of the law, with the same resultant duty on the part of the defendant to maintain and keep it safe for the use of its employees as though it had been a stair in fact.

—O'Brien v. Northwestern Consolidated Milling Co. 4.

The plaintiff, a millwright's helper employed by defendant, was directed by it to work upon a coal conveyor in its paper mill. The place in which he was required to work was a reasonably safe one, if the conveyor was not put in motion, but one of peril to him, if it was started without warning to him. *Held:* That it was the absolute duty of the defendant to use ordinary care to protect the plaintiff, while so at work, from injury by the starting of the conveyor, without warning, and whether defendant exercised such care was a question of fact.

—Wiggin v. Northwest Paper Co. 273.

Evidence that while plaintiff was working upon such conveyor, twelve or more feet above the floor of the boiler room, the fireman or his assistant pulled a hanging cable which set the conveyor in motion, was sufficient to sustain a finding that defendant did not exercise ordinary care to protect plaintiff, and the court did not err in denying defendant's motion for judgment notwithstanding the verdict.

—Wiggin v. Northwest Paper Co. 274, 276.

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MASTER AND SERVANT—Continued.

The charge to the jury was not equivalent to giving the jury the right to say that reasonable care required that defendant should guarantee the conveyor should not be started by any cause or agency. The instructions were, in effect, that, if reasonable care for plaintiff's safety required defendant to take care that the conveyor was not started while he was at work on it, and if it negligently failed so to do, then defendant was liable to plaintiff, unless he himself was negligent or assumed the risk. So construed, the instructions were correct.
—Wiggin v. Northwest Paper Co. 276.

ASSUMPTION OF RISK.[1]

Upon the evidence, plaintiff's alleged assumption of risk was a question of fact, and not of law.
—Evans v. Drake & Stratton Co. 55.

CONTRIBUTORY NEGLIGENCE.

The question as to whether the plaintiff was guilty of contributory negligence in failing to avail himself of readily accessible means of steadying himself while ascending a ladder used as a stair, and in otherwise failing to make special effort to conserve his safety while making the ascent, *held*, for the jury.
—O'Brien v. Northwestern Consolidated Milling Co. 4.

Plaintiff, foreman of a crew of drillers and blasters, was injured by a train of dump cars used in the work of stripping a mine. Defense, contributory negligence. There was evidence that, before reaching the place where the drillers and blasters were working, the trains ordinarily would stop for a signal from plaintiff and a whistle would be blown, but at the time of the injury the train neither stopped nor sounded the whistle. *Held:* The question of contributory negligence was one of fact for the jury.
—Evans v. Drake & Stratton Co. 55, 58, 59.

Whether the plaintiff was guilty of contributory negligence or assumed the risk of the injury which he received, *held*, under the evidence, for the jury.
—Millman v. Drake & Stratton Co. 124.

It does not follow, as matter of law, that plaintiff was guilty of contributory negligence or that he assumed the risk of injury, because he complied with the order of his intoxicated employer to accompany the latter in his automobile, when the employer's intoxication was known to plaintiff. It was plaintiff's duty, as servant, to obey the order of the master, unless defendant was so badly intoxicated as to be incapable of running the car properly.
—Patterson v. Adan, 285.

[1] See Master and Servant—Contributory Negligence, 124, 285.

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MASTER AND SERVANT—Continued.

QUESTIONS FOR JURY.

The question as to whether the defendant was negligent in failing to furnish the plaintiff, its servant, with a safe place in which to work, the plaintiff having been injured by reason of a defective ladder used as a stair, *held*, for the jury.

—O'Brien v. Northwestern Consolidated Milling Co. 4.

The questions as to whether the plaintiff's injury was caused by the defective condition of the ladder, and whether he assumed the risk, *held*, for the jury.

—O'Brien v. Northwestern Consolidated Milling Co. 4.

In an action by a servant against his master for injuries received by reason of the negligence of the latter in the operation of an automobile in which the servant was riding pursuant to the order and direction of the master, it is *held* that the evidence upon the question of the master's negligence in operating the car, the question of the servant's assumption of risk and contributory negligence, presented issues of fact for the jury to determine, and that the verdict is supported by sufficient competent evidence.

—Patterson v. Adan, 283.

The defendant intrusted to its employees the work of driving lumber products down a stream and through the land of the plaintiff. The work during its progress was interfered with by a stump in the stream at a point near the plaintiff's house. The foreman and a driver, another employee, then went into the stream and sawed out the obstruction, and in doing so both were wet. The driver, upon reaching the shore, built a fire on the bank of the stream on plaintiff's land for the purpose of drying his clothes. He negligently failed to put the fire out, whereby the plaintiff sustained damages. *Held*, upon a consideration of the whole evidence, that the question whether the act of the driver in setting the fire was in the course of and within the scope of his employment was one of fact for the jury, and that the court did not err in refusing to direct a verdict for the defendant.

—McLaughlin v. Cloquet Tie & Post Co. 454.

LIABILITY OF MASTER TO THIRD PERSONS.

In an action against the master and one of his employees for damages due to their alleged negligence, a verdict against the master alone must be treated as a finding in favor of the employee, although the verdict is silent as to him; but such finding does not vitiate the verdict as to the master, unless the sole negligence alleged in the com-

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MASTER AND SERVANT—Continued.

plaint against the master is the negligent act or omission of his employee.

—Webster v. Chicago, St. Paul, Minneapolis & Omaha Railway Co. 72.

Complaint herein construed, and *held* that the negligence charged against the defendant company is not solely the acts and omissions of its co-defendant and employee, and that the verdict herein is not impaired by a failure to find against the employee.

—Webster v. Chicago, St. Paul, Minneapolis & Omaha Railway Co. 72.

Evidence considered, and *held* that it tended to prove decedent stopped and gave stop signals by swinging his lantern across the track which were sufficient, if observed by the engineer or fireman, to have stopped the engine before it reached decedent; and that the circumstantial evidence furnished a reasonable basis for the inference by the jury that decedent's foot was caught between the rails at a switch, and the evidence justified a verdict in favor of plaintiff.

—Webster v. Chicago, St. Paul, Minneapolis & Omaha Railway Co. 72, 75, 76.

The settled rule of this court, stated abstractly, is to the effect that a master is liable only for the wrongful act of his servant when it is done in the course of and within the scope of his employment.

—McLaughlin v. Cloquet Tie & Post Co. 457.

While the abstract rule is well settled, some confusion has arisen in applying it concretely, especially with reference to the meaning of the phrase "The course of and within the scope of his employment." No hard and fast definition of the term, applicable to all cases, can be given. The tendency of the later cases is toward a more liberal and practical construction, especially in cases where the business of the master intrusted to his servant involved a duty owed by him to the public or third persons.

—McLaughlin v. Cloquet Tie & Post Co. 458.

MORTGAGE.

RECORD.

The record of a mortgage upon which the registry tax imposed by Laws 1907, p. 449, c. 328, has not been paid, being prohibited by the statute and thereby declared invalid for any purpose, is not evidence of the fact that it was duly recorded, or of the validity of the instrument.

—Orr v. Sutton, 193.

A certificate upon the back of such a mortgage, made by the county treas-

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MORTGAGE—Continued.

urer, before the same was recorded, that the mortgage was not subject to the tax, *held* not to conclude the holder of the title to the property under the prior foreclosure.

—Orr v. Sutton, 193.

REGISTRY TAX.

Mutual B. L. Ins. Co. v. County of Martin, 104 Minn. 179, 116 N. W. 572, sustaining the constitutionality of Laws 1907, p. 449, c. 328, imposing a registry tax upon mortgages, followed and applied.

—Orr v. Sutton, 193.

EVIDENCE AS TO PAYMENT.

Action to foreclose a real estate mortgage, which the defendants claimed had been paid. The trial court found that in 1902 the mortgage and note were sold by the mortgagee, and the assignment to the buyer was duly recorded; that the assignee died testate in 1904, and one Allen was appointed her executor; that in 1905 a final decree in her estate was made and the residue of the estate assigned to Allen and another as trustees for plaintiff and her brother; that the trust was terminated in 1906 and the trustees received from plaintiff a receipt for her securities; that she left her securities with Allen and he kept them in a tin box at the bank of which he was vice president; that in 1909 the amount of principal and interest was sent to Allen, who executed a satisfaction of the mortgage as executor of the assignee, and sent the same, with the note and mortgage, to the owners of the mortgaged premises; that at the time Allen executed the satisfaction he had no authority, either as executor or as trustee of the plaintiff, to execute it; that plaintiff had no knowledge that Allen ever assumed to act as executor or as trustee after his discharge as trustee in 1906; that neither the mortgagee nor the defendants ever had any knowledge that Allen had been discharged as executor or appointed as trustee, or that the mortgage had become the property of plaintiff, until after the failure of the bank of which Allen was vice president. The court found that the mortgage had been paid. *Held:*

1. The finding was justified by the evidence.
2. There was no error in the admission of evidence tending to show payment, although the transactions testified to were without the knowledge, consent or authority of plaintiff.
3. Plaintiff conferred on Allen complete apparent authority to receive payment, and defendants were justified in acting thereon and in paying

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MORTGAGE—Continued.

the principal to him upon delivery of the securities and a satisfaction of the mortgage sufficient upon its face.

—Harris v. Hanson, 20, 25, 26.

RELEASE OF MORTGAGOR FROM PERSONAL LIABILITY.

The mortgagor in a mortgage of real property, the mortgage being a mere incident to the debt or obligation secured, may be released and discharged from his personal liability for the payment of the debt by a subsequent parol agreement with the mortgagee, founded upon a valuable consideration; and such an agreement is not in violation of the statute of frauds.

—First National Bank of Benson v. Gallagher, 463.

An agreement in parol to release the mortgagor from his personal liability must be established by clear and convincing evidence, for the effect thereof is to set aside the written contract.

—First National Bank of Benson v. Gallagher, 463.

Of course the rights of third persons can only be affected by a discharge of the mortgage of record in the manner pointed out by law.

—First National Bank of Benson v. Gallagher, 466.

REDEMPTION.

To entitle a creditor to redeem as a matter of legal right, it is necessary that he have some interest in or lien upon the land which, either at law or in equity, gives him the right to protect his interest in the specific property, or to have it appropriated in satisfaction of his claim to the exclusion of all others.

—Orr v. Sutton, 195.

The mere existence of a valid mortgage does not give the holder thereof the right of redemption as against prior or subsequent lien holders. To complete the right as against third persons, the mortgage must be of record, and evidence thereof produced to the officer when redemption is made.

—Orr v. Sutton, 197.

The right of redemption after foreclosure is purely statutory, and the conditions prescribed as essential to the right as granted to a junior mortgagee or other creditor having a lien on the property must appear of record before it may be exercised.

—Orr v. Sutton, 195.

That one who has redeemed from a foreclosure may contest the validity of a lien under which a subsequent redemptioner claims the right to redeem has often been decided by this court.

—Orr v. Sutton, 197.

A mortgage upon real property, upon which the registry tax imposed by

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MORTGAGE—Continued.

Laws 1907, p. 449, c. 328, has not been paid, though erroneously recorded by the register of deeds, furnishes no sufficient legal basis in the mortgagee for the redemption from the foreclosure of a prior mortgage upon the same property, as against the holder of the title under that foreclosure.

—Orr v. Sutton, 193.

MECHANIC'S LIEN.

The revision of the statutes in 1905 made no radical change or departure in the mechanic's lien law as it existed prior thereto.

—Wallinder v. Weiss, 416.

RIGHT TO LIEN.

The basis for the right to a mechanic's lien found in Laws 1889, p. 313, c. 200, § 1, is restated in R. L. 1905, § 3505, and it is plain therefrom that it is made to rest upon the ground that the one whose interest is to be charged therewith has either contracted for the improvement, or else it has been done at his instance.

—Wallinder v. Weiss, 415.

Where the owner of premises, upon which improvements are to be erected for which the statute gives a right to a mechanic's lien, contracts with the mechanic for personal supervision and temporary store and toolhouses in connection with the work he undertakes, the mechanic is entitled to claim a lien for the whole contract price.

—Lindquist v. Young, 219.

IMPROVEMENT BY LESSEE—PROTECTION OF OWNER.

A lessor may, by posting or giving notice, as required by section 3509, R. L. 1905, prevent mechanic's liens from attaching to his interest, although in the lease he has given the tenant permission to make the alterations for which the lien is claimed; the tenant having agreed to pay for the alterations and to restore the building to its former condition at the end of the term.

—Wallinder v. Weiss, 412.

The word "authorized," as used in section 3509, is not synonomous with a permission or consent to an improvement made by a lessee or vendee for the latter's convenience. It means authorized by contract with, or by direction, or at the instance of the owner or person interested, and not merely by his permission or consent at the instance of a tenant or vendee.

—Wallinder v. Weiss, 416.

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MECHANIC'S LIEN—Continued.

LIEN STATEMENT.

A statement in a lien filed, as to a matter not required to be stated, does not prevent the lien claimant from pleading and proving the facts where no one has been misled by such statement.
—Lindquist v. Young, 219.

If a mechanic includes in his statement for a lien nonlienable items, that fact would not necessitate granting defendant's motion to dismiss an action to foreclose the lien, for plaintiff in any event would be entitled to a personal judgment against defendant upon proper proof.
—Lindquist v. Young, 222.

The law does not require the lien statement to indicate either that the lien is claimed under a contract price or that it is based upon an implied contract for the reasonable value. There is no fatal variance between a lien statement which claims a lien for the reasonable value of the materials and findings of the court that the sale was for an agreed price.
—Lindquist v. Young, 224.

EVIDENCE.

The evidence sustains the findings as to the right of the intervener to a lien for the amount therein stated.
—Lindquist v. Young, 219.

Rulings on admission and exclusion of evidence examined and *held* to show no reversible error.
—Lindquist v. Young, 219.

TRIAL.

No prejudice resulted to the owner from the order compelling another lien claimant to intervene after plaintiff's cause was tried and before entry of judgment, for it was open to the owner to suggest to the court at the trial of plaintiff's action that such lien claimant ought to be made a party as contemplated by R. L. 1905, § 3517.
—Lindquist v. Young, 219.

FEES AND COSTS.

The allowance of fifty dollars for attorney's fees as costs by the court is reasonable, and the statute permitting such allowance is constitutional.
—Lindquist v. Young, 219.

MUNICIPAL CORPORATION.

ASSESSMENT FOR PARK PURPOSES.

On appeal to the district court in proceedings to assess the cost of land taken for park purposes under Sp. Laws 1889, p. 567, c. 30, § 4, the

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MUNICIPAL CORPORATION—Continued.

court was acting really as a court of appeal, the report of the assessors having much the effect of the verdict of a jury or the decision of a trial judge. State v. District Court of Hennepin County, 33 Minn. 235, 22 N. W. 625.

—Everington v. Board of Park Commissioners, 337.

In such proceedings "due notice" to the property owners whose lands are affected is given in a published notice which describes no property except that taken for park purposes, is not directed to anyone by name and in no other way indicates upon what property or district the assessment may be spread, and is not personally served.

—Everington v. Board of Park Commissioners, 338, 339.

The decision of the trial court, to the effect that the assessors did not act on illegal or erroneous principles in assessing property on the opposite side of the Mississippi river from the proposed park as specially benefited by the park, is sustained by the evidence.

—Everington v. Board of Park Commissioners, 334, 339.

It was not prejudicial error to try the case on affidavits, with permission to objectors to apply to be permitted to offer oral testimony in addition.

—Everington v. Board of Park Commissioners, 334.

POLICE POWER—REGULATING SHOWS.

Experience teaches that, where amusements are furnished for pecuniary profit, the tendency is to furnish that which will attract the greatest number, rather than that which instructs or elevates. To say the least, opinions are quite at variance as to the merits of moving picture shows as an influence for good or evil in a community.

—Higgins v. Lacroix, 150.

Under the charter of the city of St. Paul, the power to license and regulate the exhibition of shows of all kinds, including theaters and moving picture shows, is with the common council, is a legislative power, and cannot be delegated to the city clerk.

—State ex rel. v. Redington, 402.

Certain ordinances passed by the common council considered, and *held* not to be an exercise of its legislative or discretionary power to license and regulate all shows and theaters, and that the council still retained the power to license and regulate such shows and theaters, including the power to grant or refuse a license in a particular case.

—State ex rel. v. Redington, 402.

A careful reading of the ordinances referred to in connection with the charter provision giving the common council power to license and regulate shows of all kinds, leads to the conclusion that the council

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MUNICIPAL CORPORATION—Continued.

had never passed an ordinance which can be fairly construed into a grant of a license to theaters or shows in general, no matter what their character, or in what part of the city they might be located.

—State ex rel. v. Redington, 405.

There is much more in the power to "license and regulate" than the mere fixing of the amount of the license fee. It is not to be doubted that, under this power, the common council could prohibit improper exhibitions, or exhibitions in portions of the city in which, for reasons of the public welfare, it was undesirable to have such exhibitions. The power given by the charter is to regulate as well as to license. This clearly includes the power to prohibit.

—State ex rel. v. Redington, 406.

MUNICIPAL ORDINANCE.

For the purpose of determining the validity of a general ordinance relating to the good order and government of a village, it is error to receive in evidence admissions by individuals of the village council that the motive in enacting the ordinance was to accomplish a nonpermissible or unlawful end.

—Higgins v. LaCroix, 145.

EXERCISE OF GOVERNMENTAL AND OTHER POWERS.

In this state a city, in maintaining a board of health, a police or a fire department, discharges a governmental function pure and simple, and we believe, as to these or similar functions, it has no power to escape the burden imposed by granting a franchise to anyone to perform in its place. But as to furnishing water, light, etc., for private concerns and public purposes combined, the furnishing of which is not imposed by law as a governmental duty, the city, if it undertakes so to do, assumes a position to those injured through its negligence therein which is not different from what would be the position of one to whom it had granted the right to furnish water or light.

—Brantman v. City of Canby, 398.

MUNICIPAL DEPARTMENTS—LIGHTING PLANT.

Where a city undertakes to serve both public and private convenience by maintaining a municipal lighting plant to light its streets and also furnish gas to private consumers, it is not exercising a governmental function, so as to escape responsibility for negligence in the management of such plant, whereby an injury has been caused to the person or property of an individual.

—Brantman v. City of Canby, 396.

Plaintiff suffered injuries from a gas explosion in his cellar. The evidence

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MUNICIPAL CORPORATION—Continued.

presented a question of fact for the jury as to whether or not such gas had escaped from a leak in the pipe supplying a street lamp.

—Brantman v. City of Canby, 396.

USE OF STREETS.

The authority conferred upon the municipality over the streets thereof is supreme, and any wrongful interference therewith by third persons constitutes a trespass or a nuisance, as the case may be, of which, as a general rule, only the public can complain.

—Worden v. Bielenberg, 332, 333.

A municipality, whose public streets and grounds have been placed under the control of its common council, or other officers, may maintain an action in the name of the municipality to abate a nuisance therein and to enjoin its maintenance. The complaint herein alleges facts constituting such a cause of action.

—City of Jordan v. Leonard, 162.

An impossible description in the complaint, by metes and bounds, by reason of an evident mistake therein, is mere surplusage. The other allegations of the complaint show the threatened acts of defendant will result in real and serious injury, that is, irreparable injury.

—City of Jordan v. Leonard, 164.

Defendant excavated the stone on his own land up to line of plaintiff's land. He also excavated in the street in front of his property, the grade of which had never been officially established or changed from the natural level, so that plaintiff's access to his lot was interfered with and the natural condition wholly interfered with. But there was no prospect that the street would ever be restored to its former level. *Held:* A permanent injury, and the measure of plaintiff's damages was the diminution in the market value of his property.

—Worden v. Bielenberg, 330, 333.

Action for injury to pedestrian who was struck by defendant's automobile while crossing a street. Evidence considered, and *held* sufficient to authorize submission of an issue of "wilful negligence" although the issue was not presented by the pleadings.

—Johnson v. Scott, 470.

VACATION OF STREET.

The village of Excelsior had power to vacate a portion of Lake street and properly exercised such power.

—Empenger v. Fairley, 186.

NOTICE OF PERSONAL INJURY.

While the phraseology of Laws 1897, p. 459, c. 248, and of R. L. 1905, § 768, differ somewhat, the meaning is substantially identical.

—Gaughan v. City of St. Paul, 65.

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MUNICIPAL CORPORATION—Continued.

History of R. L. 1905, § 768, and the decisions construing its provisions.

—Gaughan v. City of St. Paul, 65, 66, 67.

R. L. 1905, § 768, requiring notice to a city, village or borough of a claim for damages for loss or injury by reason of any defect in a street, road, bridge, or other public place, or by reason of the negligence of its officers, agents, or servants, has no application to a claim of liability under section 4536, R. L. 1905, for loss sustained by one furnishing labor or material to a contractor with a municipal corporation by reason of the failure to take from the contractor the bond required by section 4535.

—McMullen Lumber Co. v. Village of Pine Island, 60.

Section 690 of the charter of the city of St. Paul, which is substantially identical with R. L. 1905, § 768, requiring written notice of injuries caused by any defect in any bridge, street, etc., or by reason of any alleged negligence of any officer, agent, servant, or employee of the said city, to be given to the city council as a condition precedent to the right to sue therefor, does not require such notice as a condition precedent to the right of an employee of the said city to sue for injuries caused by the city's failure to provide such employee with a safe place in which to work, or by the city's violation of any of the absolute duties of a master to the servant.

—Gaughan v. City of St. Paul, 63.

Action for personal injury. Allegations of the pleadings construed and *held* that the answer admitted that plaintiff had caused due service of a notice of the time, place and circumstances of the accident to be served upon the proper city officers, and proof of such service was unnecessary.

—Vills v. City of Cloquet, 277.

NAVIGABLE WATER.

The rights of riparian owners in land below the ordinary high-water mark of navigable lakes are subject to the superior rights of the public; and, where a lake or other body of public water is raised to a point not beyond the ordinary high-water mark, under the authority of R. L. 1905, § 2552, et seq., the riparian owner is not entitled to compensation.

—State ex rel. v. District Court of Kandiyohi County, 132.

In proceedings under that statute to create a uniform stage of water in Foot lake in Kandiyohi county, *held:*

1. It is unnecessary to begin proceedings to condemn land necessary to carry out the purposes of the project, when no land is to be acquired.

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NAVIGABLE WATER—Continued.

2. It is unnecessary for the district court to specify the maximum sum which may be assessed upon benefited lands, as required by section 2554, when no lands are to be assessed for benefits.

3. An improvement of this character can be made where the cost of making is not raised by assessments upon benefited property. Section 2558.

—State ex rel. v. District Court of Kandiyohi County, 132, 134, 135.

The report of the assessors in such proceedings to raise the waters of Foot lake in Kandiyohi county, to the effect that no lands would be damaged by raising the lake, *held* sustained by the law and the evidence.

—State ex rel. v. District Court of Kandiyohi County, 132.

NEGLIGENCE.

Where the complaint, in an action for injuries alleged to have been caused by the defendant's negligence, failed to allege "wilful negligence," but such issue was litigated by the parties, and it was manifest that the defendant was not misled, there was no reversible error in submitting such issue to the jury, provided, of course, the evidence was sufficient to authorize such submission, especially where no exception on this account was taken on the trial.

—Johnson v. Scott, 470.

Quære, whether "wilful negligence" is provable under an allegation of ordinary negligence.

—Johnson v. Scott, 470.

PLEADING.

The complaint alleges in effect that the defendant left unguarded large quantities of carbide, a dangerous substance and attractive to children of tender years, on its premises near a public street, knowing that such children were accustomed to pick up the carbide, pour water upon it, whereby gas was generated, and then explode it by applying a light; that the plaintiff's son, five years old, secured some of the carbide so left by defendant, put it in a can, poured water on it, and in attempting to light the gas an explosion followed, whereby he was seriously injured. *Held*, that the complaint states facts sufficient to constitute a cause of action.

—Juntti v. Oliver Iron Mining Co. 518.

PROXIMATE CAUSE OF INJURY.

The decisions of this court amply sustain this principle: Where several concurring acts or conditions, one of them a wrongful act or omission, produce an injury, such wrongful act or omission is to be regarded as

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NEGLIGENCE—Continued.

the proximate cause of the injury, if it be one which might reasonably have been anticipated from such act or omission, and would not have occurred without it.

—Vills v. City of Cloquet, 282.

Action for personal injury. The court submitted to the jury the question of the causal connection between the alleged negligence of defendant and the injury to plaintiff, using the word "direct" instead of the word "proximate." *Held:* The court did not err; the word "proximate" when so used is synonymous with "direct" and "immediate."

—Sivertson v. City of Moorhead, 469.

NEW TRIAL.

The fact that a witness called by the plaintiff wilfully gave false testimony on the trial to the prejudice of the defendants' interests, and in favor of the plaintiff's claims upon the vital questions involved, did not require the granting of the defendants' motion for a new trial, where it did not appear that the plaintiff was in any way responsible for or implicated in the giving of such false testimony, except that he produced the witness, and where the trial court fully granted the defendants' request for instructions concerning such witness and his testimony, which testimony, furthermore, was known by the defendants on the trial to be false, and was contradicted by witnesses produced by the defendants for that purpose.

—Millman v. Drake & Stratton Co. 124.

Action to recover possession of land, to which plaintiff claimed title by reason of a practical location of the boundary line, acquiesced in by the parties; also by adverse possession. Verdict for the defendant, and a new trial was granted, on the ground that the verdict was not justified by the evidence. *Held*, that the evidence was not so manifestly in favor of the verdict that it was error to grant a new trial.

—Marek v. Holey, 216.

Discretion of Court.

An order granting a new trial will be treated as made on the ground that the verdict is not sustained by the evidence, when the language of the order or of the memorandum clearly shows the new trial to have been granted on that ground, though the fact is not therein specifically stated.

—Christie Lithograph & Printing Co. v. American Bonding Co. 11.

The evidence in this case was not manifestly and palpably in favor of the verdict, and it was not an abuse of discretion to grant a new trial.

—Christie Lithograph & Printing Co. v. American Bonding Co. 11.

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NEW TRIAL—Continued.

Whether a new trial should be granted because of misconduct of counsel rests in the sound discretion of the trial court. In this case there was no abuse of such discretion.

—Patterson v. Adan, 283, 286.

Action by a common laborer for injuries caused by a defective boiler used in operating an artesian well. *Held:* The trial court did not abuse its discretion in denying plaintiff's motion for a new trial on the ground that the verdict was not justified by the evidence, or on the ground of newly discovered evidence.

—Sivertson v. City of Moorhead, 467.

Refusal of the trial court to grant the defendant a new trial on the ground of misconduct of one of the jurors in conversing with one of the witnesses for the plaintiff, etc., which was known to defendant and his counsel before the verdict was returned, *held*, upon the showing made, clearly proper.

—Johnson v. Scott, 470.

Where the evidence was conflicting as to the mental capacity of testator, and on the question whether the alleged will was executed as required by statute, the court reversed the lower court and granted a new trial in the interest of justice.

—Kennedy v. Kelly, 531.

NEWLY DISCOVERED EVIDENCE.

Impeaching evidence which is newly discovered is not a ground for a new trial, except in extraordinary cases.

—Sivertson v. City of Moorhead, 470.

NUISANCE.

Abutting property owners suffering a special injury from obstructions or nuisances in the street fronting their property, distinct from that suffered by the general public, may maintain an action for an injunction restraining the nuisance.

—International Lumber Co. v. American Suburbs Co. 77.

PARENT AND CHILD.

Evidence upon an application by a son for the allowance of a claim against his deceased mother's estate for board, services, etc., such services being held to have been rendered her while she was living with him as a member of his family, considered, and *held* to sustain the trial court's finding that the estate was not liable for such claim.

—Beneke v. Estate of S. M. Beneke, 441.

The general rule deducible from the authorities is that, where a child

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PARENT AND CHILD—Continued

after arriving at majority continues to reside as a member of the family with the parent, or with one who stands in the relation of a parent * * * the presumption is that no payment is expected for services rendered or support furnished by the one to the other. This presumption is not, however, conclusive, and may be overcome by proof either of an express agreement to pay, or of such facts and circumstances as show satisfactorily that both parties at the time expected payment to be made. Einolf v. Thomson, 95 Minn. 231, 103 N. W. 1026.

—Beneke v. Estate of Sophia F. Beneke, 445.

PARTIES TO ACTION.

A party who has neither demurred because of defect of parties, nor set up such defect by answer, is not entitled to a dismissal of the action on the merits on the ground of defect of parties.

—Kanne v. Kanne, 265.

If the legal heirs were necessary parties, the court could have directed them to be made parties, but should not have dismissed on the merits without an opportunity to plaintiff to bring them in.

—Kanne v. Kanne, 271.

PATENT.

A corporation was organized to manufacture and sell certain farm implements covered by patents obtained by plaintiff and to be obtained by him at the expense of the corporation. Plaintiff was the manager, a stockholder and officer of the corporation. For the right to use such patents in the manufacture of such implements, plaintiff was monthly paid a certain sum, in the nature of a royalty. *Held*, that there was no intention to restrict the sale or use of the articles manufactured, and the right to sell the articles so manufactured under plaintiff's patents was incident to the right to manufacture, and therefore all articles manufactured while that right existed may, after such right ceased, be sold by the corporation or its successor in interest without let or hindrance from plaintiff.

—Poirier v. Bradford, 475, 479.

PERJURY.

On a prosecution for a crime, testimony tending to prove an attempt to commit such crime is competent and material, and may, if false, constitute the predicate for a subsequent charge of perjury.

—State v. Smith, 107.

The fact, therefore, that the corpus delicti of the crime charged is not

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PERJURY—Continued.

established will not preclude a subsequent prosecution for perjury predicated upon false denials of a prior confession or admission of the crime charged.

—State v. Smith, 107.

An acquittal upon a prosecution for a crime is not a bar to a subsequent prosecution for perjury predicated upon testimony given upon such former prosecution, unless a conviction of the charge of perjury would necessarily import a contradiction of the jury's verdict upon the former trial.

—State v. Smith, 107.

PLEADING.

An objection to the sufficiency of a pleading, made for the first time in this court, will be overruled if, by any fair construction or intendment, a cause of action or defense may be spelled out of the allegations.

—International Lumber Co. v. American Suburbs Co. 79.

COMPLAINT.

Where the complaint in a personal injury action by a servant against his master alleged a failure on the part of the defendant to provide a safe instrumentality, namely, a ladder which was used in lieu of a stair, and that the plaintiff was injured by reason of its defective condition, but it was also alleged that the plaintiff was injured by reason of the defendant's failure to furnish him with a safe place in which to work, the only objection, if any, to which the pleading was open was that it suggested a case where the plaintiff might, perhaps, have been compelled to elect between two different theories of recovery; and, in the absence of any motion to compel the plaintiff to so elect, there was no reversible error in submitting the case to the jury, under the evidence, upon the theory of the defendant's duty to provide the plaintiff with a safe place in which to work.

—O'Brien v. Northwestern Consolidated Milling Co. 4.

The result, at most, was a mere variance, which, if it had been objected to, could have been cured by an amendment of the complaint on the trial, or even after judgment.

—O'Brien v. Northwestern Consolidated Milling Co. 4.

Allegations of the complaint considered, and *held*, that they do not come within the rule that where the complaint alleges in the alternative two statements of fact, one sufficient to constitute a cause of action and the other not, they neutralize each other. The complaint states facts sufficient to constitute a cause of action.

—Grbich v. Pittsburgh Iron Ore Co. 365.

Allegations in a complaint that it was the duty and custom of defendant

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PLEADING—Continued.

to give its employees, including plaintiff, timely notice of the explosion of a blast, so as to enable them to reach a place of safety before the explosion; a reliance on the duty and custom by plaintiff; and the negligent failure of defendant to discharge the duty, in that the notice and warning that a blast was about to take place were not timely given, so that plaintiff could get to a safe place, which resulted in dirt and rock being thrown in his face, whereby he was severely injured—states facts sufficient to constitute a cause of action.

—Grbich v. Pittsburgh Iron Ore Co. 367.

An objection that a complaint in an action for fraud in the exchange of automobiles was fatally defective because it contained no allegation that plaintiff "believed" the misrepresentations, when not taken until the time of trial, was properly overruled.

—Jones v. Magoon, 437, 438.

In deciding whether a complaint states a cause of action, when the question is raised for the first time at the trial on a motion for judgment on the pleadings, plaintiff is entitled to every intendment and inference which a jury might legitimately draw from its allegations, and the motion should be denied, if the complaint can be sustained by the most liberal construction.

—Ames v. Brandvold, 521.

The complaint states a cause of action for the negligent failure of defendant to provide plaintiff with a safe place in which to work, and it is not demurrable.

—Anderson v. Brooks-Scanlon Lumber Co. 542.

ANSWER.

An answer alleging the failure of the legislature properly to enact the statute imposing a registry tax upon mortgages *held* without merit, and the order striking it out is sustained.

—Orr v. Sutton, 193.

Where there is no reply, allegations of new matter in an answer stand admitted.

—Geib v. County of Morrison, 262.

AMENDMENT.

The service of an amended pleading takes the place of the former pleading and stops all further use thereof.

—First State Bank of Mountain Lake v. C. E. Stevens Land Co. 215.

In an action for personal injury the court instructed the jury that, if they found for the plaintiff, they might take into consideration plaintiff's loss of time resulting directly from the injury. Defendant excepted to the instruction on the sole ground that loss of time was not pleaded.

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PLEADING—Continued.

On plaintiff's motion the trial court allowed an amendment of the complaint in this respect. *Held:* The trial court did not abuse its discretion in allowing the amendment.

—Stuhr v. Wright County Telephone Co. 511.

JUDGMENT ON PLEADINGS.

Action by trustee in bankruptcy to set aside a conveyance alleged to be in fraud of the bankrupt's creditors. *Held:* Plaintiff's motion for judgment on the pleadings was properly denied, even though he were entitled to partial relief, where the motion does not so limit the recovery sought.

—Kanne v. Kanne, 265.

PRINCIPAL AND SURETY.

A surety on an appeal bond is not released by a stipulation, made in good faith, for an affirmance of an order or judgment appealed from.

—First State Bank of Mountain Lake v. C. E. Stevens Land Co. 209.

If a creditor informs a surety that the debt is paid or settled, and thereby lulls the latter into security, inducing him to take no steps to protect himself, and the surety thus suffers damage, the creditor is estopped from thereafter proceeding against the surety.

—Wilkins v. Hanson, 399.

Evidence considered, and *held* to make a case for the jury on the questions whether the creditor stated to the surety that the debt was settled, whether the surety was thereby induced to take no steps to protect himself, and whether he thereby suffered damage.

—Wilkins v. Hanson, 399.

PROPERTY.

Timber severed from the land by an act of God remains realty as between grantor and grantee and passes by a conveyance of the land.

—Reynolds v. Great Northern Railway Co. 254.

Quære: As between a landowner and a tort feasor, and in the absence of any act of severance on the part of the owner, is timber which has been felled by the act of God to be considered realty or personalty?

—Reynolds v. Great Northern Railway Co. 251.

RAILWAY.

It is a well-understood fact that a person cannot, with any degree of accuracy, judge of the distance of an approaching train when the only guide is the headlight of an engine.

—Nelson v. Northern Pacific Railway Co. 350.

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RAILWAY—Continued.

It is difficult, if not impossible, to determine how far a train is distant from its noise alone.

—Weiss v. Great Northern Railway Co. 359.

INJURY TO TRESPASSER.

Action by a trespasser for assault and for injuries in being thrown from a moving freight train. *Held:*

1. The evidence was such that the question was clearly for the jury, and the evidence sustained the verdict.
2. There was no error in instructing the jury that the defendant's duty applied to both occasions when plaintiff boarded the train.

—Gee v. Great Northern Railway Co. 438.

INJURY AT HIGHWAY CROSSING.

Plaintiff's intestate was killed on a dark night at a dangerous highway crossing by the defendant's railway train. Verdict for $3,750 for the plaintiff. Evidence considered, and *held* that the question of the intestate's contributory negligence was one of fact to be decided by the jury, and that the damages are not so excessive as to justify any interference with the verdict.

—Lane v. Northern Pacific Railway Co. 258.

Action for death of plaintiff's intestate at a railway crossing. The verdict in favor of plaintiff was based entirely upon defendant's failure to provide gates or a watchman at the crossing, as required by a resolution of the city council. *Held:*

1. Whether defendant was negligent in not providing a watchman or gate at an early hour of the evening was one of fact, and properly submitted to the jury.
2. Whether it was prudent for decedent, who resided less than two blocks distant from the crossing and was familiar with it and the operation of trains, to attempt to cross the track before an approaching train, which was kept from his view until he was within one or two steps from the track on which it was coming, on a dark and windy night, was not a question of law but one of fact for the jury.

—Nelson v. Northern Pacific Railway Co. 347.

In an action for injuries received by a pedestrian, who was struck at night by one of the defendant's engines at a grade crossing, evidence considered, and *held* sufficient to take the case to the jury upon the question as to whether the headlight of the engine was lighted, and also upon the ultimate issues as to negligence on the part of the defendant and contributory negligence on the part of the plaintiff.

—Weiss v. Great Northern Railway Co. 355.

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RAILWAY—Continued.

If the headlight of the engine was unlighted at the time of the accident, such fact would constitute negligence.

—Weiss v. Great Northern Railway Co. 357.

Instruction that, if the jury found that the engineer discovered plaintiff when the engine was 100 or 150 feet west of the crossing and she apparently was not noticing the train, but was approaching the crossing as if unconscious of its approach, it would be his duty to give warning immediately. If he did not do so immediately, it would be negligence on his part and on the part of defendant. *Held:* not reversible error.

—Weiss v. Great Northern Railway Co. 355, 360.

CONTRIBUTORY NEGLIGENCE.

The knowledge that a train is approaching is an important circumstance to be considered, together with other circumstances, on the question of contributory negligence, but we cannot hold that under the evidence in this case the plaintiff must be deemed to have been guilty of contributory negligence simply because of such knowledge.

—Weiss v. Great Northern Railway Co. 360.

FIRE.

The defendant's railway track was 275 feet from plaintiff's church, which was destroyed by fire. The nearest point from the track where, under the testimony, the fire could have originated was 150 feet. *Held,* upon an examination of the record, that the evidence justified the jury in finding that the fire was set by sparks thrown from a locomotive passing over the track.

—Trustees of Little Cedar Congregation v. Chicago, Milwaukee & St. Paul Railway Co. 181.

REGISTRATION OF TITLE.

American states which have adopted the Torrens system and those in which it has been held that the statute enacted was constitutional.

—Peters v. City of Duluth, 99.

The right to apply for the registration of a land title is not affected by the availability or adequacy of other remedies.

—Peters v. City of Duluth, 96.

We cannot sustain the contention that the applicant's title must be settled before he can apply for registration. The very purpose of the proceedings is to settle the title.

—Peters v. City of Duluth, 107.

The contention that the Torrens act contemplates registration only at the instance of a fee title owner in possession, and not by an "apparent owner" who is not in possession, cannot prevail. The purpose of the

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REGISTRATION OF TITLE—Continued.
act is to provide a speedy and summary remedy to clear up title to land.
—Peters v. City of Duluth, 106.
The remedy provided is not a substitute for an action of ejectment, and a successful applicant may have to resort to ejectment to obtain possession. Moreover, the relief in ejectment is not coextensive with that which may be had upon an application to register.
—Peters v. City of Duluth, 106, 107.
Section 3389 R. L. 1905, relative to dismissals of applications to register, does not render the act invalid as in violation of Const. Art. 1, § 8, declaring that there shall be a remedy for every wrong, etc.
—Peters v. City of Duluth, 96.

RIGHT OF APPEAL.
In proceedings to register a land title, under R. L. 1905, c. 65, commonly known as the Torrens law, no appeal lies from a denial of a defendant's application for a jury trial, nor from an order denying a defendant's motion to dismiss the application.
—Peters v. City of Duluth, 96.

RIGHT TO JURY TRIAL.
Neither the registration act [c. 65] nor the general law of the state confers any absolute right to a jury trial upon any of the issues that may arise in registration proceedings.
—Peters v. City of Duluth, 96.
Const. Art. 1, § 4, providing that "the right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy," does not apply to a proceeding, under R. L. 1905, c. 65, to register a land title.
—Peters v. City of Duluth, 96.

APPEARANCE BY PARTIES ACQUIRING INTEREST PENDENTE LITE.
Under R. L. 1905, § 3395, providing that, where a person acquires an interest in land pending proceedings to register the title thereof and prior to the entry of decree, he must appear and answer in such proceedings "at once," persons who delayed more than six months after actual notice of proceedings to register the title to certain land before making application for permission to answer in such proceedings, in order to assert interests alleged to have been acquired pendente lite, were not entitled to answer as a matter of right; R. L. 1905, § 3396, having no application to such a case.
—Brown v. Hagadorn, 491.

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REGISTRATION OF TITLE—Continued.

The trial court *held*, in such case, not to have abused its discretion in denying the application for leave to answer.

—Brown v. Hagadorn, 491.

Upon an application by grantees in a deed from a claimant to the land pendente lite for leave to answer in such proceedings, the claim of the moving parties that their grantor had acquired title to the land by adverse possession prior to his conveyance to them could not be determined upon a hearing of the application. Yet the court had the right to consider the evident weakness of such claim in determining the application.

—Brown v. Hagadorn, 496.

SALE.

BREACH OF WARRANTY.

Where, in the sale of a sawmill with warranty that it should be of good material, well made, and capable of doing good work, the evidence tends to show that the contract of sale called for steel pinions, but cast iron pinions were furnished; that these pinions broke, and the seller, when notified by the purchasers, promised to send steel pinions, but sent cast iron, renewing and breaking the promise repeatedly; that the breaking of these pinions caused frequent interruptions in the work of the mill and loss to the purchasers—it was error to strike out the evidence relating to the purchasers' claim for damages on the ground that the warranty in the contract of sale provided that the sole remedy for a breach was a return of the mill within a specified time.

—Detwiler v. Downes, 44.

Also *held* that, if the promises made subsequent to the delivery of the mill are not treated as giving the purchasers an independent cause of action in case of breach, such promises and attempted performances are evidence of waiver of the written notice stipulated in the contract of sale as a prerequisite to any claim for damages against the sellers.

—Detwiler v. Downes, 44.

SCHOOL AND SCHOOL DISTRICT.

This appeal involves the formation of a new school district out of a portion of the territory of an independent district, and is from an order denying a motion for a new trial, after a finding by the jury to the effect that the best interests of the territory affected required the formation of the new district. *Held:*

1. The trial court did not err in its ruling as to the admission of evidence

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SCHOOL AND SCHOOL DISTRICT—Continued.

concerning representations made to secure the location of an agricultural school within the old school district.

2. The question of when and under what conditions school districts may be organized, or their boundaries changed, is a legislative one, which has been qualifiedly delegated to the respective county boards of the state.

3. On an appeal to the district court from an order of the county board organizing a new school district, the question must be determined by a consideration of what is for the best interests, present and future, of the people of the territory, considered as a whole.

4. The finding of the jury is not so manifestly against the preponderance of the evidence as to justify the conclusion that the trial court abused its discretion in denying a new trial.

—Irons v. Independent School District No. 2, 119.

The formation of the new district here in question out of the territory of an independent school district maintaining an agricultural school cannot be held to be contrary to public policy, for that which the statute authorizes cannot be legally against public policy.

—Irons v. Independent School District, No. 2, 123.

The rights and interest of territory, remote from the seat of government of the appellant district, ought not to be sacrificed for revenue.

—Irons v. Independent School District No. 2, 122.

The "best interests of the territory affected," as used in R. L. 1905, § 1285, providing for an appeal to the district court from an order of the county board granting or denying a petition for a new school district, means the best interests of the people of the whole territory. The interests of the most populous portion, or those of the sparsely settled and struggling portion, cannot be independently considered; for the interests of the strong can never be the measure of the rights of the weak.

—Irons v. Independent School District, No. 2, 123.

STATUTE.

The court takes judicial notice of the legislative journals.

—Orr v. Sutton, 198.

The legislative journals disclose nothing fairly tending to show Laws 1907, p. 449, c. 328, was not read in the Senate before passage as required by the Constitution or to overcome the presumption that it was not regularly enacted.

—Orr v. Sutton, 198.

Discussions of lawmaking bodies when considering and enacting a law may, when the language is obscure and doubtful, be considered by the

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STATUTE—Continued.

courts for the purpose of arriving at the true intent and meaning of the act, but manifestly it ought to be beyond the power of one who has been intrusted with authority to enact a law to impeach the same by any subsequent statement of secret or avowed motives entertained at the time of its passage that would work its invalidity.

—Higgins v. Lacroix, 148.

The classification made by the primary election act of 1912 (p. 4, c. 2), as to cities of the first class and those having home rule charters, is not arbitrary or unconstitutional. The classification is within the reasonable discretion of the legislature, and it is valid.

—State ex rel. v. Erickson, 158.

TITLE OF ACT.

The title to Laws 1912, p. 4, c. 2, is fairly suggestive of a purpose to repeal all statutory provisions as to the nomination of candidates for state office by party conventions. The act in this respect is valid.

—Johnson v. Schmahl, 179.

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STREET RAILWAY.

Power and authority to construct and operate a street railroad cannot be conferred by a local municipal board or council upon a private corporation organized for the purpose of dealing in real estate.

—International Lumber Co. v. American Suburbs Co. 77.

Where the local municipal authorities grant to a street railway corporation the right to construct and operate a line of railroad upon and along the public streets of the municipality, conditioned upon the filing by the company of a written acceptance of the grant within a specified time, a compliance with the condition as to acceptance is essential to the vesting of the grant; and the grant will lapse and cease if the condition be not complied with.

—International Lumber Co. v. American Suburbs Co. 77.

The findings of the court in this case, that defendants failed to file the necessary acceptance, *held* sustained by the evidence.

—International Lumber Co. v. American Suburbs Co. 77.

If a nuisance be placed in the street by a corporation, an owner of property abutting on the street may challenge the authority of the corporation in the premises, and its right to exercise a street car franchise.

—International Lumber Co. v. American Suburbs Co. 77.

The mere fact, however, that plaintiffs are specially damaged is not alone sufficient to sustain their right to an injunction. It must further appear that defendants are without authority to lay their railroad in the street and highway in question. If defendants have been legally and properly vested with this authority, then plaintiffs are not entitled to an injunction, though they might have an action for damages.

—International Lumber Co. v. American Suburbs Co. 83.

Action to enjoin defendants from constructing a street railway. The court found that the street in question had been graded and graveled in the center to a width of twelve feet; that from this graveled way the street sloped to gutters on each side, and, in times of wet weather, the street was impassable for loaded teams outside the graveled way; that plaintiffs, to reach the market with their products, would be required to make almost constant use of the street with heavily loaded vehicles; that it would not be practicable to haul such loads along or across defendants' tracks in the condition in which defendants intend to maintain them; that, when completed, the earth embankment between the ties

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STREET RAILWAY—Continued.

would be at some points a foot or so below, and at other points a foot or so higher, than the center of the graded highway; and that defendants had placed at a number of points shallow drainage across their grading leading to the ditch, but the relative levels of the public highway and of the defendants' embankment were such that the drainage of the public road would be seriously impaired and the road seriously damaged.

Held: The findings showed that the acts of defendants specially affected plaintiffs in a manner different from the general public, and entitled them to an injunction.

—International Lumber Co. v. American Suburbs Co. 77, 80, 81.

TAXATION.

TAX TITLE.

The requirement of R. L. 1905, § 927, that a county auditor must give certain notice before he sells lands for taxes, is mandatory, and calls for a purely ministerial act on the part of the auditor, the nonperformance of which renders a sale by him void.

—Foster v. Malberg, 168.

Although that requirement is mandatory, yet under the doctrine of caveat emptor as applied to tax sales the purchaser at such a sale is conclusively presumed to know of the existence of every defect in such proceedings; and hence if, by reason of the auditor's failure to give the prescribed notice, the purchaser fails to obtain a valid title, it must be considered that the latter's own want of proper care and diligence, and not the neglect or default of the auditor, was the proximate cause of the purchaser's injury, so that the latter, in an action upon the auditor's official bond, can have no recovery against the former therefor, in the absence of statute to such effect.

—Foster v. Malberg, 168.

DESCRIPTION OF PROPERTY.

A description of land in a tax proceeding is sufficient if it so describes the land that the owner thereof and all persons interested in it, if of ordinary intelligence, may identify it with reasonable certainty. Evidence of extrinsic facts is admissible to apply the description and identify the land. The usual way of identifying a government subdivision of land, or a lot in the platted portion of a village or city, is by reference to the official survey and plat thereof.

—Foster v. Cochran, 206.

Rule applied, and *held*, that a description in a tax proceeding of lot 6 in a designated government section as the northwest quarter (N. W. ¼) of the northeast quarter (N. E. ¼) of the same section is sufficient.

—Foster v. Cochran, 206.

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TELEGRAPH AND TELEPHONE.

While the plaintiff was driving a threshing outfit on a highway, the smoke-stack of the engine came in contact with the wires of the defendant, suspended over the highway so low as to obstruct travel thereon, whereby he sustained personal injuries, for which he had a verdict. Evidence considered, and *held*, that it sustains a finding that the defendant was negligent, that the plaintiff was not.

—Stuhr v. Wright County Telephone Co. 508.

TORT.

ACTION.

A cause of action for a wrong is predicated upon the violation of an ultimate duty, and though the performance of such duty may require the doing or omission of many separate and distinct acts, the omission or doing of which would constitute a violation of the ultimate duty, it is nevertheless the violation of the latter, and not the specific acts or omissions, which constitute the actionable wrong or delict.

—Liimatainen v. St. Louis River Dam & Improvement Co. 243.

TRIAL.

OBJECTION TO EVIDENCE.

Action for destruction of a church building by fire. A witness who came upon the ground within an hour after the fire started was asked what effects of the fire he saw, if any; what part burned, if any. *Held:* An objection that the question was too remote was properly overruled.

—Trustees of Little Cedar Congregation v. Chicago, Milwaukee & St. Paul Railway Co. 184.

INSTRUCTIONS TO JURY.

While a legal mind may understand an instruction to the jury, the correctness of an instruction is to be governed by a consideration of how a jury might understand the language, not how it is understood by judges and lawyers.

—State v. McGrath, 324.

Trial courts should exercise care to make the jury understand clearly that each element of a crime must be proved beyond a reasonable doubt to justify conviction;—should realize that the men who compose our juries are not versed in legal terms, and often are quite unable to grasp the real meaning of instructions given, unless couched in the plainest and most emphatic words.

—State v. McGrath, 325.

Where the court, in charging the jury, referred to the necessity of re-

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TRIAL—Continued.

sorting to circumstantial evidence as to the origin of fire set by sparks, because sparks emitted in the daytime are, ordinarily speaking, invisible, no unfairness or prejudice can result from thus stating common knowledge.

—Trustes of Little Cedar Congregation v. Chicago, Milwaukee & St. Paul Railway Co. 181.

Where the court in a personal injury action had given full and clear instructions on the defenses of contributory negligence and assumption of risk, *held*, that the following requested instruction, stating the master's duty in conjunction with the servant's assumption of the risks of the employment, was properly refused as inaccurate and misleading, to wit: "Defendant was under no obligation to furnish safe employment for plaintiff, or to do its work in a safe way, provided the dangers of doing the work in the way it was done were open, apparent, understood, and appreciated by plaintiff, or would have been by the exercise of common sense and observation on his part."

—Evans v. Drake & Stratton Co. 55.

Where the general instructions clearly, fully, and correctly stated the rules of law applicable to the facts proven, so far as the defendants were concerned, there was no error in the action of the trial court in refusing an instruction requested by the defendants as to what would not constitute negligence of the plaintiff's coemployee in running the engine, as engineer thereof, from which the plaintiff was thrown.

—Millman v. Drake & Stratton Co. 124.

Action to recover for personal injury caused by the scalding of plaintiff while substituting an "injector" attached to a pipe from defendants' boiler. *Held:* There was no reversible error in charging the jury that it was proper for them to consider the permanent deformity which plaintiff had suffered, "as appears from the undisputed evidence in the case, and its character and extent." There was no attempt in the record to show mental suffering resulting from the deformity.

—Johnson v. Forrestal, 202, 205.

In actions to recover damages for fraud and deceit, an instruction that plaintiff is entitled to recover upon establishing the cause alleged by a fair preponderance of the evidence *held* correct. Many such cases have come to this court where instructions of that tenor have been given without objection.

—Schmeisser v. Albinson, 428, 433.

Where, in an action by a pedestrian, who was struck by an automobile while he was crossing a street, the question of the plaintiff's contribu-

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TRIAL—Continued.

tory negligence was fully and fairly covered by the instructions given, there was no error in refusing to instruct that the plaintiff was guilty of contributory negligence, if he failed to look before he started to cross the street and while crossing the same.

—Johnson v. Scott, 470, 474.

Action for destruction of standing timber by fire. The trial court, in its instructions, gave the correct rule of damages and subsequently stated the rule in a more restricted form, and in language which, if taken literally and alone might be considered to ignore the fact that there was fallen timber on the land. If counsel deemed that to be its effect, he should have called the attention of the court thereto and requested a clarifying addition.

—Reynolds v. Great Northern Railway Co. 256.

FINDINGS OF THE COURT.

Action to recover possession of land. The complaint alleged title and right of possession in the plaintiffs, and the answer alleged title and possession in defendant. The findings of fact were that plaintiffs were the owners in fee of the land and entitled to the immediate possession thereof, which was wrongfully withheld from them by the defendant. *Held*, that trial courts are required to find only the ultimate issuable facts, and are not bound to find mere evidentiary facts. It was not error to deny defendant's motion to amend the findings.

—Hayes v. Hayes, 1.

The evidence and issues examined and *held* that it was error to dismiss the case on the merits when the parties rested, without making findings of fact and conclusions of law. One of the ultimate facts involved inferences and conclusions to be drawn from the existence of other facts in issue.

—Kanne v. Kanne, 265, 270.

VENDOR AND PURCHASER.

An unrecorded quitclaim deed from plaintiff's grantor to plaintiff, construed together with a contract entered into between them at the same time, constituted plaintiff the agent or attorney of the grantor to conduct litigation, sell the property described in the deed, and divide the proceeds, and did not make plaintiff a bona fide purchaser, or give him a title that can prevail as against the subsequent estoppel of his grantor by the judgment and decision in the former suit.

—White v. Hewitt, 340.

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VERDICT.

A verdict assessing damages in a certain sum, with interest at six per cent, is not uncertain or ambiguous, when the record shows the date from which such interest should be computed.

—Trustees of Little Cedar Congregation v. Chicago, Milwaukee & St. Paul Railway Co. 181.

Action against defendant company and two of its servants. Verdict in favor of plaintiff for a specified sum "against the defendant" "railway company only with interest at 6 per cent." There being other defendants in the action than the one named in the verdict, it is evident that the word "only" therein refers to the defendant railway company, and not to the amount.

—Trustees of Little Cedar Congregation v. Chicago, Milwaukee & St. Paul Railway Co. 185.

WILL.

An executor may appeal from a judgment of the probate court construing the will and assigning the property to a devisee. Burmeister v. Gust, 117 Minn. 247, 135 N. W. 980, followed and applied.

—Empenger v. Fairley, 186.

A devise by reference to a record of a deed, conveying a platted lot by metes and bounds, construed to mean the testatrix devised title only to the premises described in the deed, although a part of the street abutting on the lake in front of the land conveyed was vacated while the grantor of testatrix, and her devisee, was owner of the lot.

—Empenger v. Fairley, 186.

WITNESS.

The proposition that a party to an action calling a witness for examination in chief is responsible or vouches for his veracity is true to a very limited extent.

—Millman v. Drake & Stratton Co. 131.

A child of the grantee in the deed sought to be set aside is not an interested party, prohibited by the statute from testifying to conversations between the deceased grantor and his son.

—McEleney v. Donovan, 294.

CROSS-EXAMINATION.

Where a witness on cross-examination admits that he is not friendly to one of the parties, it is not proper on redirect examination to show by him why he was unfriendly. *Held*, upon the facts disclosed by the record herein, that the admission of such evidence was reversible error.

—Town of Wells v. Sullivan, 389.

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WORDS AND PHRASES.

The word "extension," in the ordinance granting respondent a franchise to string electric-light wires, does not apply to mere subsidiary connections of consumers' premises within an established service zone, but refers to extensions of the system or service zones.

—State ex rel. v. Consumers Power Co. 235, 236.

The word "proximate," for the want of a better one, is usually used by courts to designate the legal cause of an injury, but the word "proximate" when so used is synonymous with "direct" and "immediate."

—Sivertson v. City of Moorhead, 469.

One definition of "to work" is to manage or turn to some particular course or way of thinking or acting by insidious means.

—Palmerlee v. Nottage, 353.

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